

FEDERALISM STUDIES

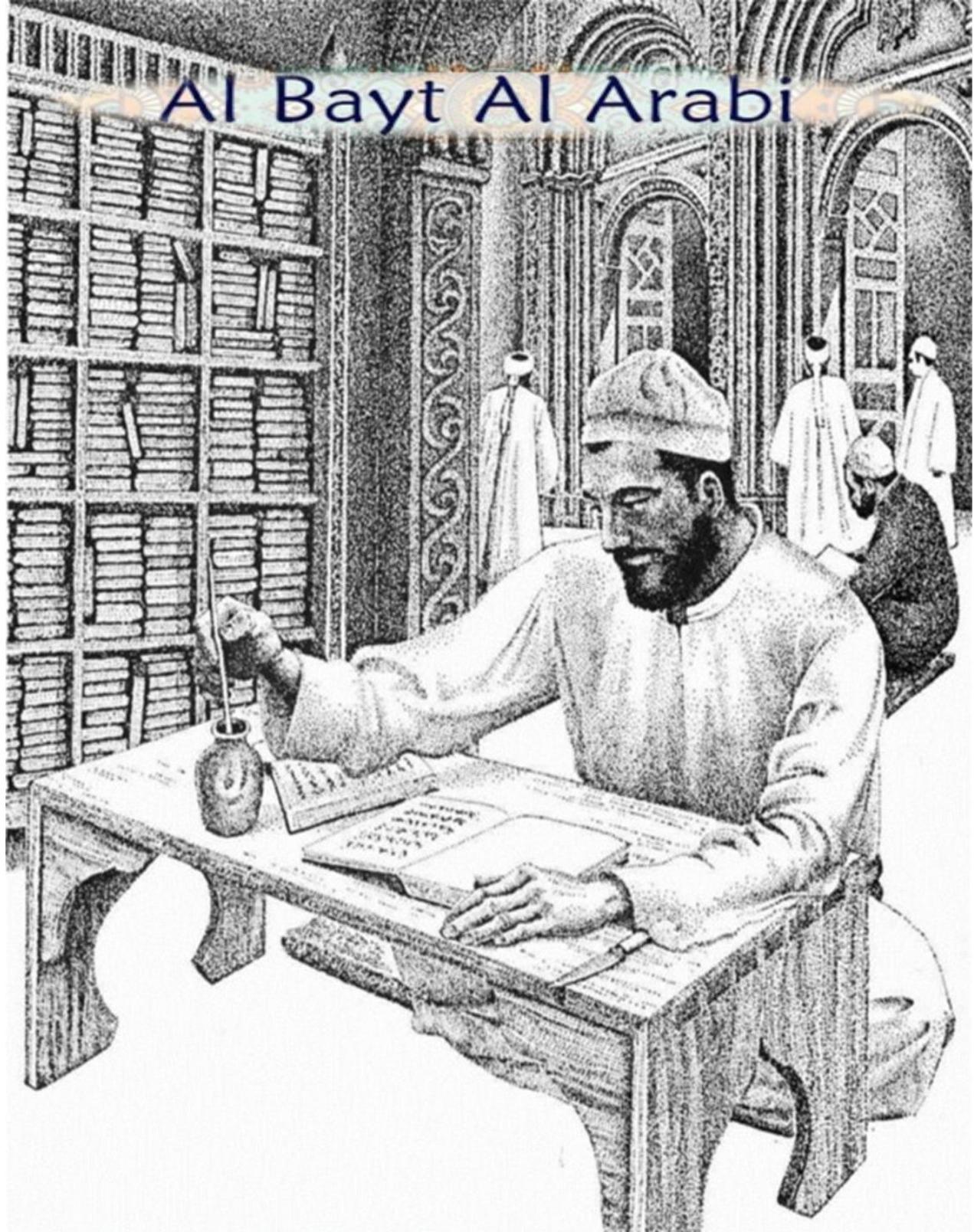


# Iraqi Federalism and the Kurds

Learning to Live Together

Alex Danilovich

Al Bayt Al Arabi



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# IRAQI FEDERALISM AND THE KURDS

*As a consequence of the US intervention in Iraq, Kurdish autonomous provinces have contributed actively to a de facto ethno-federalism analyzed here for the first time in a remarkable scholarly study by Alex Danilovich.*

Gérard Chaliand, Nanyang University, Singapore

*Putting forward a bold and vigorous case for a federal solution to Iraq's current social and political fragmentation Danilovich is under no illusions as to the problems and pitfalls to be encountered, and indeed transcended, if Iraq as a state is to survive. This book will raise a few heckles in some quarters perhaps, but it is nonetheless an honest attempt by a well-informed outsider to weigh the possibilities calmly and dispassionately. To those lay readers not directly involved in Iraq and its problems, it is certainly a refreshing antidote to the notion of Iraq's future as an endless cortege of funerals and car bombs.*

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*This timely book provides a thorough, systematic and detailed appreciation of an ever-sensitive issue. Valuable on-the-spot insight is combined with sober and lucid academic analysis of a high order. Anyone seeking an accessible and penetrating understanding of the structures, the core issues, and the condition of contemporary Baghdad—Kurdish relations will be well-advised to consult this book.*

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*Whether federalism can successfully prevent deeply-divided countries from breaking apart is one of the central questions of the contemporary era. Through a thoroughly-researched in-depth analysis of the Kurdish case, this book makes a significant contribution to scholarship on the territorial-political impact of federalism and post-conflict reconstruction in Iraq.*

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## Learning to Live Together

ALEX DANILOVICH

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ASHGATE

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# Preface

Media reports from the Middle East are unavoidably tied with scenes of carnage and death, while the very name of Iraq has become synonymous with political instability. Coming to Iraqi Kurdistan in May 2009, I felt like I was always on the lookout for a deadly encounter. My anxiety grew stronger at the sight of block posts and armed uniformed people in the streets, and the books I was reading (*The End of Iraq, The Goat and the Butcher*) only compounded my tenseness. Now, with my fears more tempered after four years of field research in Iraq, I decided to tell a story based on what I have learned from direct observations and framed by theoretical insights.

As a professor of Political Science teaching Iraqi students, and in my off-campus interactions with people, I have realized that the country is undergoing enormous political upgrading and modernization, one aspect of which is its new federal system. This transformation is overly painful, problematic, but on-going and promising.

Federalism is clearly a liberal idea that puts limitations on the majority in order to accommodate minorities. The 2005 Iraqi constitution introduced this framework for state-building in yet another attempt to keep the country's unity. The constitution is not free of inconsistencies, contradictions and ambiguities, a result of difficult compromises between various parties, including international constitutional assistants. This aspect of the new Iraqi political system has captivated me, and the main focus in the book is placed on these new federal relations. In spite of many difficulties on the federal road and the prevailing pessimism, I entertain a rather hopeful vision for the future of federalism in Iraq, based on what I have directly observed and researched. The title of this book reflects its overall attitude towards Iraq's federal venture.

The idea to research the federal relationships of the new Iraq was embraced by a colleague, Dr Francis Owtram, and we jointly developed a theoretical explanatory framework for the book. He also contributed a chapter on federalism and natural resources sharing. Later Francis had to leave Iraq and could not contribute more as initially planned. Therefore, I take full responsibility for the organization of the book, possible errors, and style imperfections. I also acknowledge my limits in interpreting all the complexities, sub-plots and overtones of Iraqi politics that are not essential for understanding the federal relationship.

I am grateful to my Kurdish students, colleagues and friends for the many insights I gained from our discussions.

ALEX DANILOVICH

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# Acknowledgements

I dedicate this book to my Kurdish students from whom I think I have learned as much as they learned from me. This book is in many respects the result of my interaction with them in the classroom, during office hours and individual supervision. They have proved avid learners and sharp thinkers. I particularly value the insights into their culture, traditions and Islam I gained from them as well as a wealth of empirical data they collected while working on the projects that I supervised.

I feel particularly indebted to Akam Mohammed Mustafa, Rahma Sabi and Nigar A. Mohammed.

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# List of Abbreviations

CPA	Coalition Provisional Authority
CRS	Congressional Research Service
DFR	Department Of Foreign Affairs
HRW	Human Rights Watch
ICG	International Crisis Group
IDEA	Institute For Democracy And Electoral Assistance
IGC	Iraqi Governing Council
IKP	Iraqi Kurdistan Parliament
ISCI	Islamic Supreme Council Of Iraq
ISG	Iraqi Study Group
ITF	Iraqi Turkmen Front
KA	Kurdistan Alliance
KCP	Kursitan Communist Party
KDP	Kurdistan Democratic Party
KIG	Kurdish Islamic Group
KIU	Kurdistan Islamic Union
KJU	Kurdistan Judges Union
KNA	Kurdistan National Assembly
KPC	Kirkuk Provincial Council
KR	Kurdistan Region
KRG	Kurdistan Regional Government
KRI	Kurdistan Region Of Iraq
PJAK	Free Life Party Of Kurdistan
PKK	Kurdistan Worker Party
PUK	Patriotic Union Of Kurdistan
SCIRI	Supreme Council Fo The Islamic Revolution In Iraq
SDP	Socialist Democratic Party
TAL	Transitional Administrative Law
TAN	Transitional National Assemby
UIA	United Iraqi Alliance
UNAMI	United Nations Assitance Mission For Iraq
WMD	Weapons Of Mass Distraction

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# Introduction: Iraqi Federalism, a Large-Scale Social Experiment

Iraq, an embattled Middle Eastern country, is gradually emerging from war and ensuing ethno-sectarian violence. It has adopted a constitution that introduces a federal system designed to palliate conflicts and keep the country's territorial integrity. Since the inception of the first federal polity, federalism seems to have offered a mechanism to deal with divided societies, to appease ethnic violence and to preserve the international borders of states intact. Federations appear to produce these desirable outcomes better than other systems. The creation of a federal Iraq was meant to achieve the same goals exactly and was introduced under US auspices, with US military and political backing, and supported by only some groups within Iraq, notably the Kurds.

Introducing an ethno-federation in the Middle East was, it can be argued, an ambitious project, tantamount to a large scale social experiment. The idea of granting autonomy to the Kurds, say, in Turkey, Iran or Syria would not be considered a solution, but a major challenge to the national identity and previous policy of these states. The introduction of federalism in any of Iraq's neighbors would cause a revolution, yet Iraq has engaged in this experiment in an attempt to break the logic of zero-sum conflict and offer yet one more opportunity for Kurds and Arabs to learn to live together.

In addition to federalism, the new Iraqi constitution adopted in a 2005 referendum introduced a combination of overly contradictory principles in its constitutional system. It re-established Islam as a state religion<sup>1</sup>, but offset it by the incorporation of liberal democratic principles, both of which constitute the foundation for legislation. Article 2 of the Constitution reads:

Islam is the official religion of the State and is a foundation source of legislation:

- A. No law may be enacted that contradicts the established provisions of Islam.
- B. No law may be enacted that contradicts the principles of democracy.
- C. No law may be enacted that contradicts the rights and basic freedoms.

The rights and basic freedoms spelled out in Section II of the Constitution amount to a Bill of Rights that sets typical liberal constraints on the government.

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<sup>1</sup> Iraq under Saddam was a secular state, although Saddam in the later years of his rule used Islamic references in an effort to buttress legitimacy and expand his powerbase.

One of our Kurdish acquaintances wants to challenge the constitutionality of a law recently enacted by the Kurdistan Region's parliament. The law bans polygamy and thereby deprives him of his constitutionally guaranteed right to have several wives (under the established provisions of Islam guaranteed by the Constitution). On the other hand, this new Kurdish law is in good harmony with the liberal principles of the same constitution that proclaims equality, gender equality more particularly.

Most scholars see Islam and liberal democracy as antithetical, and from their perspective, the Iraqi Constitution lays irreconcilable principles in its constitutional groundwork, which is in the words of Cole (2006) an "attempt by ayatollahs to engage with the ideals of Jean-Jacques Rousseau." This constitutional innovation has a direct bearing on Iraqi federalism, as any piece of legislation enacted by the Kurdish parliament has to simultaneously satisfy both sets of principles—Islamic and democratic. The Constitution also gives the Federal Supreme Court a strong judicial review power making the Court a sharp instrument for managing federal relations.

The situation in Iraq resembles a huge experiment, in which social scientists can observe the consequences of actions taken on the scale of an entire country. The most acute questions that scholars have been curious about, may find answers in the process of this experiment:

- Can Western ideas take root and flourish in non-Western societies?
- Can a Western constitutional framework hold in a deeply divided society where politics is largely identity-based and revolves around ethnic, tribal and sectarian allegiance?
- Can Islamic principles successfully sit with Western liberalism within one constitutional system?

And an important country-specific question:

- Is Iraqi federalism a solution to the problem of the country's severe disunity or is it just a temporary fix as the Kurds jockey for position, whilst they bide their time for declaring independence?

The results of this experiment may also strengthen or undermine the value and utility of federalism as a possible "technological" solution to human problems. We find ourselves fascinated observers in this unfolding experiment, and this book focuses on one of the experiment's many aspects—the nascent federalism of Iraq.

### **Iraqi Federalism: A Marriage Made in Heaven or Hell?**

The boom of literature on federalism can be partially explained by the prevailing view that federalism has a well-pronounced applied character, as opposed to the more theoretical nature characteristic of political studies in general. Federalism as a specific institutional arrangement seems to be quite easily employed to

manage domestic conflicts that have become increasingly common in the era of transition from authoritarianism to democracy. It appears that the best way to hold fragmented and falling apart countries together is to share power constitutionally and turn their threatened unitary polities into federations.

On the other hand, the introduction of federalism, ethno-federalism in particular, has often unintended consequences. Holding together federalism is designed to maintain the unity of multi-ethnic states; at the same time it can be a prelude to separation, as it allows an ethnic group to mobilize resources and prepare for ultimate secession. This phenomenon is known in literature as “paradox of federalism.” Iraq offers a graphic illustration of how this paradox plays out. The Kurds, who obtained significant autonomy in the new Iraqi federation, have now many governmental institutions required for independence—a parliament, a cabinet, specialized departments, including foreign relations, defense and security, all of which would serve them well if the Kurdistan Region decided to break away. Furthermore, federalism has given the Region the context in which it has been able to develop its economy and establish linkages with governments and businesses worldwide.

In the opinion of many, starting the process of state-building and democratization with the creation of an ethno-federation is a recipe for failure. Yet the new Iraq has been clearly designed as an ethno-federal state. Throughout the history of Iraq, the relationship between the Kurds and Arabs has ranged from rebellions in the 1960s to administrative autonomy in the 1970s, a no-fly zone in 1991, to a federation since 2005. Iraqi Kurdistan acquired its *de facto* autonomy after the Gulf War in 1991, and was detached from the rest of the country by the establishment of a no-fly zone under an extension of UN Resolution 688. Even at that time, given the arguably propitious conditions, the Kurdish leaders did not opt for full independence. They knew that any such attempt would be vehemently opposed by its neighbors with a significant Kurdish population—Turkey, Syria and Iran<sup>2</sup>. Thus, in response to independence rhetoric in Iraqi Kurdistan, Turkey’s foreign minister, Abdullah Gul, stated that Turkey would intervene militarily to guarantee “Iraq’s territorial integrity” (Blandfield 2003). Another important circumstance that cut short considerations of full independence was the fact that some areas of Iraqi Kurdistan were not covered by the no-fly zone and remained under Baghdad’s control. Thus, staying within Iraq as a federal unit was a pragmatic choice for the Kurds even in 1991.

The current federal system in Iraq has not resulted from a typical devolutionary bargain struck within a unitary state, as usually happens in the holding together-type of ethnic federalism found in Canada or Belgium. The possibility of federalism in Iraq was brought into being by foreign intervention in two instances—first, the introduction of a no-fly zone in 1991 and then a direct military invasion and subsequent occupation in 2003. These circumstances along with a history of a bitter relationship between the Kurds and the Arabs that had culminated at one

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<sup>2</sup> The particular history of state-formation after World War I and ongoing geopolitics have always presented insurmountable obstacles to Kurdish statehood.

point in the use of chemical weapons against Kurdish civilians could not be inconsequential for the nature of the resulting federation. Therefore the Iraqi case is particularly interesting for the study of federalism, as on one hand, federalism was conceived by domestic actors as a step to assuage the unforgiving rivalry, and on the other hand, it was imposed by external forces.

Analysts and laymen alike try to understand what has been going on in the new Iraq over almost a decade. Will federalism hold, will Iraq survive as a country or will the edifice designed and constructed by foreign constitutional engineers collapse like a house of cards? Iraqi watchers, pundits and experts are utterly divided on that issue; the prevalent view is that the current federal system is not viable. Some even set specific dates when the Kurds will announce independence. Thus, Barak Obama's former election adviser claims that "the Kurds will win independence by 2016." His view is based on economic calculations, Kurdish energy resources, and the success of the Nabucco pipeline in particular (Khanna 2010).

From what we have observed over the last four years in Iraqi Kurdistan and being cognizant of the geopolitical constraints to Kurdish secession, we advance a somewhat optimistic interpretation that sees federalism in Iraq continuing in the future. This optimism is also tempered by the knowledge that not all federations have survived, and many now successful federal polities endured growing pains and deep conflicts in the past. It has to be said that all assertions are necessarily tentative with the Middle East in the whirlwind of systemic change engendered by the uprisings of the "Middle Eastern Spring," whose outworking will take decades to fully discern.

Furthermore, we are not so naïve to infer some deep bond between the different ethnic groups in Iraq. For the great majority of Kurds, federalism is and always will be a second best choice to full independence. They aspire to a position of autonomy that federalism may allow, a second-best choice, but one which is realistic and may have benefits, primarily the absence of war and associated increased security. For ordinary people this can be a life without genocidal persecution and a gradually improving standard of living; for elites the prospects of vast riches from the development of the oil resources and a share of Iraq's revenues.

Many peculiar features of Iraqi federalism can obviously be tracked down to US-led state-building since 2003, which itself follows on the previous periods of state-building after World War I, the war that ended several empires and engendered territorial chaos in the Middle East and beyond. Not only were the territories of established tribal communities divided by force, but some new state borders were drawn across the lands inhabited by ethnic groups residing there for millennia, as happened in many places—the Balkans, Nagorno Karabakh and particularly Iraq. The process of colonial state formation initiated in the Middle East by Britain after the collapse of the Ottoman Empire was followed in Iraq by the era of post-colonial monarchy and the decades of Saddam Hussein's state-building efforts in pursuit of integration and assimilation.

From the very beginning, Iraqi state-building has been an extreme example of the creation of an artificial state: a state constructed by Britain out of the Ottoman

vilayets of Mosul, Baghdad and Basra in order to allow British development of the hydro-carbon reserves of Mesopotamia. Although most states in the world are artificial and do not accord to the European Westphalian model, which was the outcome of more natural territorial revisions and dynastic alliances/marriages, taking place over hundreds of years, in the Middle East we see a starker mismatch of identity and territory, an incongruence which finds its most extreme expression in the state of Iraq. In Iraq, as in much of the Middle East, the state has had to compete for loyalty with both sub-state identities (tribe, sect and ethnicity) and supra-state identities (pan-Arabism and pan-Islamism). Saddam Hussein's solution was a highly centralized authoritarian state in which Sunni dominance was maintained in a regime run through the channels of the Ba'ath party and an inner circle of trust drawn from the Tikriti clan of Saddam Hussein's birthplace.

It is obvious that the development of Iraqi federalism and the Kurdistan Region's place in it must be set in the context of Iraqi embattled state-building, from the creation of an artificial state, a product of British colonialism, to the current federal architecture resulting from US invasion and occupation. Since Iraq's creation by the British, there has been a mismatch between state and identity, as the Kurdish nation has been living in four different countries. This incongruence is acutely felt in the Iraqi Kurdistan Region, which saw various attempts to gain autonomy in its relationship with Baghdad, most of which proved quite transient and short-lived.

The creation of a federal system of government is the latest attempt to build an Iraqi state with a view to accommodating the underlying issues of identity. It can be argued that under Saddam Hussein, as in the case of Yugoslavia and elsewhere, national identities were suppressed and when authoritarianism was removed, they came to the fore. A further point is that the experience of *Anfal*—genocide for the Kurds, and the Sunni-Shia conflict in 2006–7 have made it all but impossible for a sense of Iraqi identity, and the feeling of “altogetherness” to be built, an identity that all people in the state of Iraq could eagerly espouse.

In the Kurdistan region's interlocutory relationship with Baghdad, rhetoric of secession is sometimes used, though it should not necessarily be taken at face value. The political elite of the Kurdistan Region of Iraq, although often seen in the media and in some academic analysis as tied to a secessionist agenda, has been aware, of the geopolitical limitations of this landlocked region and, on the other hand, of the benefits of being part of a federal Iraq. Therefore passionate rhetoric about an imminent declaration of independence may quite often have blackmailish connotations in bargaining situations with Baghdad rather than real intentions.

The Iraqi case also demonstrates in its most acute form the importance of federal origins. Due to the autonomy experienced by the Kurdistan Region of Iraq prior to 2003, the reconstruction of the Iraqi state on a federal basis will necessarily have some characteristics of the coming-together type of federalism. If sufficient powers are not awarded to the Kurdistan Region, it is unlikely that the Kurds will support a re-strengthened Iraqi central state. However, the establishment and development of strong Kurdish institutions will continue to serve as a focal point of what might look like secessionist mobilization and cause suspicions and

anxieties in Baghdad and elsewhere. It is instructive to note that even today some opponents of a decentralized federation refer to Iraqi federalism as partition.

In this book, we examine the development of federalism in Iraq and the place of the Kurdistan region within it by focusing on the key issue identified in federalist studies as “paradox of federalism.” We try to determine which way the paradox of federalism is likely to play out in the new Iraq. Therefore we look at the most peculiar features of Iraqi federalism, the most likely area where the paradox can manifest itself. By doing so we try to answer the following question: Is federalism in Iraq a good means to maintain the territorial integrity of the country or is it used by the Kurds as a stepping stone towards a breakup of the country and ultimate declaration of independence?

We will explore this issue in detail through four empirical investigations of the key aspects of federalism in the Iraqi context: (1) Kurdistan Region’s security arrangements, (2) its activism in the international arena, (3) quandaries of revenue sharing and (4) constitutional inconsistencies likely to affect the federal relationship.

## **Federal Regions’ Armed Forces**

The Kurds are currently quite anxious about the increasingly strong central government based on a stable and entrenched Shiite majority in the parliament, which underpins Iraqi Prime-Minister al-Malaki’s ambitions to create a strong and united Iraq with Shiites in the core. Based on a vast parliamentary majority, al-Malaki attempts to build up a strong executive, quite often overlooking some constitutional constraints in the process. The Arab Shi'a, the electoral majority in Iraq excluded from power under Saddam’s Sunny minority regime, now insist that Iraq should be governed “democratically,” meaning by the Shi'a majority, forgetting about the constitutional limitations on the majority rule in the form of federalism, constitutionally established power sharing mechanism and the Bill of Rights.

These new developments are laden with serious consequences for the federation. Having experienced Iraq’s central government’s brutal treatment, the Kurds are fearful of a strong government in Baghdad. The stronger the al-Malaki government becomes, the more suspicious the Kurdistan Regional Government grows, and the balance is not easy to achieve. Occasional statements of an anticipated declaration of independence are uttered by some Kurdish officials in spite of the geopolitical consequences of defying Turkey, Iran and Syria, and the absence of great power support for such a move. The USA, as the main architect and guarantor of the current federal system, and mindful of the view of its NATO ally Turkey, has never encouraged Kurdish ambitions to achieve independence; the USA has always seen a federal Iraq as the best vehicle for Kurdish aspirations. The Kurdish elite are also aware of the possibility that their neighbors can very easily exert economic strangulation just by closing their borders; as a result Kurdish oil would not reach international markets, as there are only two possible

transit routes—Baghdad’s controlled pipelines and Turkey’s controlled outlets. Occasional independence rhetoric is used as a threat and bargaining tool in Erbil’s relationships with Baghdad, with no real intentions and consequences, while the possession of a strong ethnically-based regional army is a more tangible instrument in dealings with Baghdad.

Federated unit armed forces, also known as state guards, state military reserves, or state militias are rather uncommon in modern federations. Territorial defense forces in ethno-federal states can potentially be a dangerous security arrangement. Iraqi Kurdistan possesses powerful armed forces called *Peshmerga* (literally, “those who defy death” in Kurdish). Obviously, the possession of a powerful army by an ethnic federal unit poses many questions and provides additional support to the view that the federal unit is preparing to break away.

We should bear in mind, however, that the current Kurdistan Region’s military and security forces resulted from the merger of the military and security arms of the two main Kurdish political parties—the Kurdistan Democratic Party and the Patriotic Union of Kurdistan. The merger is not full, as the parties keep exercising control over their respective security units. There is still a sense of distrust even among these two Kurdish parties.<sup>3</sup> In other words, the existence of Kurdish armed forces is a legacy of previous conflicts, not a new development within the recently established Iraqi federal system.

## Kurdistan’s Activist Foreign Policy and Diplomacy

Foreign countries have played significant roles in the fate of Iraqi Kurdistan. Kurdish national aspirations have been caught in the geopolitics of the region—the Iranians positioned themselves as friends of the Kurds, to be able to exert pressure against the government in Baghdad in the 1970–1980s. Syria used Kurdish nationalism against its own regional rivals, notably its support of the PKK in its struggle against the Turkish state. During the twentieth century, “the Kurds have been used repeatedly by the US, Israel and Iran to destabilize the state of Iraq, then left to their fate once immediate strategic goals have been achieved” (Anderson and Stansfield 2004: 180). An acute reflection of the Kurdish experience with foreign countries during the twentieth century is metaphorically expressed in a popular saying: “Kurds have no friends but the mountains.” Yet the Kurdistan Regional Government (KRG) now maintains a very active international relations agenda and keeps over a dozen representative offices in various countries across the globe.

Although it is not uncommon for federated units, such as Quebec or regions and communities in Belgium, to actively engage in international relations, the

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<sup>3</sup> A conflict over resource sharing between these two parties led to a bloody civil war in Kurdistan in the 1990s. In order to complement the revenues from the UN Oil for Food Program, the two parties were engaged in cutthroat competition over the boarder fees of Iraqi oil smuggled through the Turkish and Iranian borders.

Kurdish case is somewhat different and KRG diplomacy raises eyebrows in many places, Baghdad in particular. We see in KRG activism in the international arena the desire to foster and promote the Kurdish national identity within Iraq and beyond. Nationalism has been and remains a significant factor in politics. Nationalism is particularly powerful in nascent polities. Although Kurds' national identity has never been well articulated, under the current political autonomy it has been strengthened not only through historiography and literature, but also through purposeful governmental action, including in the international arena. This activism is misinterpreted by many as the desire to break away from the federation.

Our contention is that a motivation for Iraqi Kurdistan Region's diplomacy is the drive to assert national identity at home and abroad and this should not necessarily be interpreted as a forerunner to secession. Obviously, we are well aware that Kurdish diplomacy cannot be fully understood as a culturally driven phenomenon only. Undeniably, economic factors and the desire of the Kurdish elite to benefit from lucrative contracts with foreign companies play very important roles too. But in any event, we try to explain KRG diplomatic activism without reference to secessionist vocabulary.

### **Natural Resources: Problems of Federalization**

The oil sector plays a key role in Iraq's economy. Energy resources are distributed unevenly over the country; therefore, the problem of revenue sharing places a tremendous additional strain on the federal relationship.

The Iraqi Kurdistan Region is lavishly endowed with a wealth of oil and gas. The KRG is increasingly involved in developing and exploring regional resources, creating tensions with the central government over revenue sharing. This matter is so important for the country that it has been addressed in the Constitution, which contains provisions on energy revenue sharing. The Constitution leaves the door open for the Kurds to take initiatives in developing new oil resources, requiring full submission to the federal budget of all revenues coming from the developed oilfields. The Constitution, however, lends itself to various interpretations. And the KRG and the central Iraqi government tend to read the Constitution differently: the KRG claims that regions should directly benefit from their energy production, while Baghdad insists that all profits should be controlled by the federal center; and regions should get their shares of profits proportionally to their populations. The constitutional ambiguities were to be eliminated by a new federal hydrocarbon law that has never been enacted because of Kurdish objections. Instead, the KRG passed its own regional law on energy resources that provides for free foreign access to new oil fields in the Region. Several contracts have been signed on the basis of this law, but Baghdad claims that these contracts are illegal and contrary to the Iraqi Constitution. Every new contract that the KRG signs with an international oil company causes nervousness and unease in Baghdad. The use of natural resources

remains a very important, if not the most important, matter for Iraqi federalism, as tensions over oil and gas can seriously damage the federal relationship.

These three outstanding issues—security, diplomacy and revenue sharing—have been in the open and of public concern as direct challenges to Iraqi federalism and the country's unity. They have been regularly addressed one way or another at the highest level. The keywords in the press releases after the meetings of regional and central government officials have always been “Peshmarga,” “KRG foreign policy” and “oil law.” One serious challenge to Iraqi federalism not immediately obvious but that can negatively affect the federal relationship is posed by Article 2 of the federal constitution, which lays down contradictory principles into the very foundation of the Iraqi constitutional system.

## **A Federal Constitutional System that Combines Sharia and Democracy**

In addition to federalism, the new Iraqi Constitution has introduced a significant innovation in the constitutional theory of the twenty-first century. It re-established Islam and did so in an unorthodox way by offsetting state Islam with the incorporation of liberal democratic principles, both constituting the foundation for legislation. In other words, the Iraqi constitution lays irreconcilable principles in the country's constitutional groundwork, placing conflicting obligations on the government. It remains to be seen how the application of the idea of Western constitutionalism to countries in which Islamic norms and discourse are dominant will turn out. The implementation of the concept of constitutionalism is unthinkable without an active role of the judiciary. The Iraqi constitution has created a parliamentary republic whose system of courts is under parliamentary supremacy. Yet the judiciary has been granted constitutional review powers with regard to the action taken by various levels of Iraq's governments.

Obviously, it is incumbent on the Iraqi Supreme Court to give clarifications over the relationship between the law enacted both by the federal and regional legislatures, as well as between the Islamic and democratic principles of the Constitution. The extent to which the country adheres to a balanced application of these incongruent sets of principles will depend on the Supreme Court's stance. Many fear that a suddenly active Federal Supreme Court with the majority of Shi'a justices will enforce only the Sharia law of the constitution to the detriment of the constitution's liberal component, including federalism.

These are the main aspects of Iraqi federalism the book focuses on in analyzing four case studies: federalism and security, federalism and foreign policy, federalization of natural resources and federalism in a constitutional system that combines Islam and democracy.

## **Organization of the Book**

The book consists of six chapters, one theoretical and five empirical.

*Chapter 1: Federalism as a Tool to Manage Conflicts and Associated Risks* draws out a review of the abundant literature on federalism in order to build a theoretical explanatory framework to help elucidate the current state of federalism in Iraq. The chapter reviews common patterns and gives insights from various federal experiences and efforts deployed in many countries in attempts to quell ethnic conflicts. This chapter is meant to enlighten the empirical case studies that investigate peculiar features of Iraqi federalism, namely, Kurdistan's security, regional activism in the international arena, as well as the federalization of revenues and the idiosyncrasies of Iraqi constitutionalism that combines Islam and liberal democracy.

*Chapter 2: Introducing Iraq's Federal System* overviews the main features of Iraqi federalism and sets the stage for the ensuing analysis of its most controversial aspects.

*Chapter 3: Federalism and Regional Security Arrangements: Peshmarga, the Kurdish Army* analyzes the peculiar aspects of Iraqi federalism relating to security and argues that the regional armed forces do not necessarily pose threat to the federal relationship as they were created long before the adoption of the federal constitution and have been carried into the new constitution.

*Chapter 4: Federalism and Kurdistan Region's Diplomacy* addresses what looks like an excessive activism of a federal unit in the international arena, which is utterly perceived or misperceived as a sign of separatist intentions. The chapter claims, however, that there are other plausible causes for the Kurdistan Region's diplomacy. Much of the Iraqi Kurdistan's international relations is driven by the wish to assert national identity at home and abroad in conjunction with establishing economic and political linkages, and is not in itself conclusive proof of the intent to break away.

*Chapter 5: The Federalization of Natural Resources* is dedicated to a significant challenge to Iraqi federalism—the sharing of resources that Iraqi land is lavishly endowed with. The distribution of revenues coming from the sale of oil and gas has not always followed provisions of the constitution, while attempts to pass a federal law were dashed by Kurdistan's strong opposition. At the same time the KRG has enacted a regional revenue-sharing law that significantly reduces the role of the federal center and allows the Region to sign contracts with international oil companies. Baghdad attempts to veto the contracts proclaiming them illegal without its approval. The issue of revenue sharing poses serious strains on the federal relationship creating mistrust and anxiety both in Erbil and Baghdad.

*Chapter 6: Combining Islam and Democracy in a Federal Constitutional System* deals with an increasingly common phenomenon in countries where regime change and democratization have been assisted by the West—the combination of conservative religious precepts with liberal principles in one constitutional system. This experiment may appear very promising in modern history; therefore

we look at what bearings the relationship between Islam and democratic politics may possibly have on Iraqi federalism.

All empirical chapters, except Chapter 2, have a similar structure: first, the problem is presented in broad theoretical terms and the case study is introduced, a brief recapitulation of relevant theoretical postulates to guide the reader through the case study, followed by data analysis, discussion and conclusions.

In the book's *Conclusion*, we present a summary of our data analysis and interpretation and conclude that the ethno-federation in Iraq has brought peace to the divided society and created conditions in which the Iraqi Kurds may eventually learn to live together with their federal partners.

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# Chapter 1

## Federalism as a Tool to Manage Conflicts and Associated Risks

Alex Danilovich and Francis Owtram

With the intensification of ethnic conflicts in multi-cultural societies over the last two decades that has accompanied transition from authoritarianism to democracy, increased scholarly attention has moved to the ways of managing these conflicts. New theories, approaches, and policy recommendations have been profusely advanced as a result. Federalism occupies a place of choice in this booming literature as one of the most effective means to deal with divided societies and maintain the territorial integrity of deeply fragmented polities.

This chapter attempts to draw out a review of the abundant literature on federalism in order to build an explanatory framework that will help us to gain a better understanding of the current state of federalism in Iraq. We try to review common patterns and obtain helpful insights from various federal experiences and efforts deployed in many countries in attempts to quell ethnic conflicts through federalism. Federalism is believed to have become a sort of “technological” solution for deep-rooted human problems, such as nationalism and associated conflicts.

This theoretical chapter is meant to enlighten our empirical case studies that investigate various challenges to Iraqi federalism, to name, regional security arrangements and the role of the Kurdish armed forces, the Kurdistan Region’s activism in the international arena, federalization of revenues and natural resources, and finally, the peculiarities of Iraqi constitutionalism that combines the principles of Islam and liberal democracy in one constitutional system and possible implications for federal relations.

In developing this research project we believe in what Jan Erk and Wilfried Swenden say:

.... empirical evidence from single cases follows a theoretical reasoning that endorses the premise of generalizability. That is, every case is seen to be part of a bigger whole and the quest is to unearth patterns to understand and explain federalism. (Erk and Swenden 2010: 1)

This study of Iraq’s new federal system will contribute, we hope, to the burgeoning literature of comparative federalism by exploring certain theoretical perspectives in relation to Iraq, which underlie the selected empirical focus of the chapters on regional security, regional foreign policy, federalization of natural resources,

and the nature of the constitutional system. The three key inter-related theoretical issues addressed by this study are (1) accommodation versus assimilation; (2) asymmetrical ethno-federalism; and (3) the “paradox of federalism,” with emphasis placed on the latter. The paradox consists in federalism’s potential to both prevent and induce secession.

A success of federal relations in Iraq would have a significant impact on the concept of federalism and its application not only as a possible “technological” solution to deep-rooted human problems, but also to achieving quality democracy. As Dawn Brancati put it in 2004, “Whether Iraq is able to establish a stable democracy ultimately depends on the design of its system of federalism” (Brancati 2004: 11). Now almost a decade later, we would like to see how the Iraqi federal system has been faring since and how its experience can enrich our broader theoretical understanding of federalism.

## **Defining Federalism**

“Confederation,” “federation” and most of the other key components of the contemporary version of the language of federalism are derived from the Latin *foedus*, which means an alliance among individuals or collectivities aiming at the promotion of both specific and common interests (Karmis and Norman 2005: 5).

Although contemporary federalism may not be amenable to simple definition (Filippov et al 2004: 5), it is important to touch base with the reader over the concept itself before we proceed to further discussion. The classic definition by Riker (1964: 11) remains valid today and underlines the essential key characteristics of federalism:

1. Two levels of government that rule the same land and people,
2. Each level has at least one area of action in which it is autonomous, and
3. There is some guarantee ... of the autonomy of each government in its sphere

Furthermore, “in a federal state, political authority at the regional level is often exercised through a regional legislature, a regional executive, and a regional judicial system” (Anderson 2010: 129). In other words, a federated unit possesses all attributes of a polity as organized society, one step short of sovereignty.

While useful by presenting the most basic common features of federalism, this definition fails to take into account the diversity within federal institutional structures, institutional origins and various uncodified social and economic factors. “These diverse origins, institutions and meanings bring about various incentives in dealing with growing dissatisfaction with the *status quo*. In some cases, the institutions of federalism point in the direction of secessionism. In others, they do not” (Anderson 2010: 129).

Whilst there are as many federalisms as there are federations, scholars identify some key differences between federations. A federation can be: (1) strongly centralized or decentralized, (2) symmetrical or asymmetrical, (3) “coming together” or “holding together.” This latter dichotomy means, in effect, that a polity either is born federal from a bargain among previously independent political units (a coming-together federation) or becomes federal through a process of bargaining among regions within a pre-existing unitary state (a holding together federation). For example, the United States was born federal, Belgium has become federal, and Great Britain, Anderson contends, is in the process of becoming federal (Anderson 2010: 130).

Habisso argues that federalism is a reasonable design for political systems with a lot of potential to pursue the goal of stability and security. This design allows the securing of social unity and political stability in deeply divided societies by facilitating both unity and diversity and maintaining “dual identities” within a single country (Habisso 2010).

Federalism is considered particularly appropriate in transitional societies, as it not only palliates ethnic conflicts, but also strengthens and enhances the quality of democracy. According to Brancati, if federalism in ethnically diverse countries functions properly, democracy becomes more stable. On the contrary, if federalism does not function well, based on the common criteria i.e. autonomy and jurisdictions are not given to the regions for self-rule, the federal system will not succeed. Brancati illustrates this point by giving examples of several failed federal experiments: “Federalism has failed in countries such as Indonesia, Malaysia, and Nigeria precisely because it did not go far enough in granting regional autonomy. If regional governments are granted certain powers in principle, but are denied these powers in practice or given only modest powers in the first place, federalism is guaranteed to fail” (Brancati 2004: 11, 13).

## **From Assimilative Integration to Federal Accommodation**

There is a fundamental difference between federal accommodation on one hand, and assimilative integration, on the other (McGarry et al 2008; Choudry 2008; Elazar 1984). Accommodation of ethno-cultural differences or ethno-federalism is not eagerly accepted by Western mainstream policy, which is oriented towards assisting “minorities in adapting to the dominant society” (McGarry 2008: 57). “This type of self-styled ‘multiculturalism’ does not advocate public support for cultural communities to remain viable and separate for the long term ... ” (McGarry 2008: 57). “Many Western multiculturalists display a rather shallow tolerance of the cultures of non-Western immigrants, while typically juxtaposing their liberal nationalism with ethnic nationalism ... Such multiculturalism is, in our view, “pseudo multiculturalism. It is liberal integration in disguise” (McGarry 2008: 57).

Obviously, we use the dichotomy of assimilative integration/accommodation only for analytical purposes, as in real life successful federations use both at a time. The process of federation-building is meant to produce a reasonable degree of common identity; otherwise there is no sense in creating or keeping a common state, which is taken to mean that integrationist steps are necessary to certain degree in order to preserve the unity of a country.

Through Iraqi state-building since the collapse of the Ottoman Empire, the Kurds have experienced integration and assimilation the hard way. In Turkey, Iran and Syria both approaches have been extensively tested to prove only that assimilating the Kurds seems a mission impossible.

The Iraqi Kurds, as many other large ethnic groups in the Third World, have been striving to establish a nation-state following the classical logic described by William Safran *independence-state building—nation building—democracy*, “which was accepted almost as a political law of nature” (Safran 2000: 1). Unfortunately, this seemingly logical sequence of political developments has not proved viable in many places, as there are too many nations and too few states in the world. Therefore the question arises under what circumstances ethnic minorities are entitled to have a state or at least cultural autonomy and under what circumstances not? Safran (2000: 14) has identified a set of preconditions meeting which would allow an ethnic group to have federal autonomy:

- Cultural benefits are more important than economic
- Legitimate grievances over past discriminatory relationships
- Serious threat to cultural identity under the current arrangement
- The grant of autonomy will preserve the freedoms and respect of other ethnic minorities

Most large ethnic minorities easily meet all these criteria, except for the last one. Typically, when former minorities become local provincial majorities there is a serious danger that they won’t be very sensitive to the concerns of other minorities. That, for example, is what happened in Kazakhstan after the breakup of the USSR when the nationalizing elite of the Kazakh ethnic minority in what was known as Kazakh Soviet Socialist Republic, exalted over independence and proclaimed Kazakhstan the land of all Kazakhs and ... a unitary state. The Uyghurs, another national minority in the same territory, did not like that idea and wanted independence too or at least federal autonomy as the right to preserve and foster their own distinct identity. However, the Kazakhs, the newly established majority, did not let it happen, which generated fresh ethno-cultural tensions in the newly established country. Eric Nordlinger foresaw such developments and feared that accommodation of one minority (Kazakhs in our example) would lead to power abuse by ethnocentric minorities that became majorities (Nordlinger 1972). As there are many more nations than states, it would be impossible for each nation to have its own state; therefore we need to find ways of coexistence of national groups within one state (Taylor 1993: 155).

The most characteristic feature of divided society is when “political claims are refracted through the lens of ethnic identity, and political conflict is synonymous with conflict among ethno-cultural groups” (Choudry 2008: 1). “The extreme consequences of the failure to address these challenges adequately are well known: discrimination and exclusion, forced assimilation, civil war, ethnic cleansing, and even genocide” (*Ibid.*). Constitutional design plays a particular role in fixing the problems of divided societies. “So constitutions matter, and matter centrally in the response to the challenges of divided societies” (Choudry 2008: 5).

Martin Dent also suggests federalism as a way to manage conflicts fueled by nationalism and to reconcile the growing separatism of national minorities within large multi-ethnic countries; under federal arrangements national minorities establish an agreement over internal affairs, national security and foreign policy (Dent 2004). Alfred Stepan calls this type of federalism “keeping together” federalism, as opposed to the US-style “coming together” federalism (Stepan 1999). For obvious reason, the US-style coming-together federalism has a rather limited value for managing ethnic conflicts (Stepan 1999).

Federalism cannot be considered as a panacea for all ills in multinational countries. If we look what happened in the former communist federations that broke up along the ethnic lines, we will see that federalism may have been used as a springboard for secession (Leff 1999, Watts 2008). Not being free associations, communist federal units developed their institutional power for national minorities and ultimately constituted “states in embryo” ready to be caught in electoral politics and ultimately break away. In other words, at the end of the day, communist federations did little more than to facilitate minority mobilization and secession (Leff 1999).

A Canadian scholar, Will Kymlicka, in his much celebrated volumes *Multicultural Citizenship and Finding our Way* claims that federalism has spread all over the world through a process of emulation of Canada’s successful federal experience. Canada is a mixed federation that combines “a nationality-based subunit with territory-based subunits whose members share the same language, and who do not see themselves as members of different nations” (Choudry 2008 166). The Canadian federal order and the Canadian experience of managing divided societies are also hailed by many scholars and politicians (Ignatieff 2006). Will Kymlicka exalts the virtues of the Canadian model,

[F]ederalism seems the ideal mechanism for accommodating territorially defined national minorities within a multinational state. Where such a minority is regionally concentrated, the boundaries of federal subunits can be drawn so that it forms a majority in one of the subunits. (Kymlicka 1998: 135)

Kymlicka presents Canada as a paradigmatic example of how a minority has control over issues that are crucial for not only the survival, but also flourishing of its society, education, language and culture.

The undeniable success of Canadian federalism rests on constitutional techniques combining accommodation and integration in pursuit of the maintenance of territorial integrity and political unity of the large state (See Choudry for his elaborate taxonomy of techniques used in Canada to manage minority nationalism). Many scholars who praise Canada's success forget that it has become such only recently after the end of a major constitutional crisis in the 1990s when Quebec sought independence and failed. As the Canadian constitution does not have a provision allowing secession, the attempt by Quebec to break away shows a major crisis of Canadian federalism and constitutionalism. The history of Canadian federalism has not seemed to be a success story if we look at a longer period of time, say, since the creation of the United Province of Canada in the 1880s. Canadian federalism stemmed from consociation, with English as the only official language of the country. Quebec was created to protect the francophone identity, and originally was granted jurisdiction over language and cultural matters only. The recent electoral victory of Parti Quebecois (2012) is likely to pose new challenges to Canadian federalism.

In the case of Iraq, federalism was meant from the outset to accommodate Kurdish nationalism, identity, language and culture. All attempts to do that within a unitary state by domestic actors failed. The crucial role has been played by the international community. Scholars have noticed that minority rights have been increasingly internationalized, one of the features of the post-Cold War developments. "The international community plays an increasingly important role in shaping these debates, endorsing some models of integration and accommodation while discouraging others" (Kymlicka 2008: 111). The international community gives more than just moral support. "Countries that follow the recommendations of the international community may gain access to vital financial, technical, and even military assistances in addressing their ethnic conflicts" (Kymlicka 2008: 111). In the case of Iraqi Kurdistan, the current federal arrangements came into being entirely due to the intervention of international actors the hardest way. By its origins, Iraqi federalism resembles the German brand of federalism, as the selection of a federal system was strongly influenced by the geo-political context in which it originated, and the federal system of America was of particular note in the development of the German federation in the context of defeat and occupation (Ahmad and Brosio 2006: 4).

Elazar focuses on the politico-ethnic aspects of federalism and credits federalism as the most just resolution of these problems and legitimization of ethnic identities in order to attain "local and world peace" (Elazar 1984: 3–5). He further claims that federalism is likely to be the future of societal organization by asserting that the current nation-state model becomes obsolete and must yield to federal arrangements (Elazar 1982). Only federal solutions can fix seemingly intransigent political problems arising from conflicting national, ethnic, linguistic, and racial claims (Moots 2009: 408). The use of federalism to Michael Filippov has two sets of rationales: economic—governments use coercive action to resolve market failures, and political. Political justifications are more diverse and range from

granting autonomy to ethnic, linguistic and other minorities and thereby “allowing decentralization of conflict” in order to prevent regional tensions from disrupting national politics (Filippov et al 2004: 1–2).

## Symmetrical and Asymmetrical Federalism

Asymmetrical federalism is a key mechanism to recognize demands for autonomy. In his work *Comparative Federalism: Theory and Practice* Michael Burgess (2006) deftly outlines the development of the concept of asymmetrical federalism and also the relevance of its potential application in cases such as Iraq, Sri Lanka and Cyprus. In essence, asymmetrical federalism denotes the situation where *de facto* sub-state national minorities can successfully be accommodated by *de jure* constitutional, political and legal recognition in the federation. Therefore, all multinational democracies (ethno-federations) are constitutionally asymmetrical. In other words, in order to hold multinational polities together, the constitutions assign different cultural, linguistic competences to different federal units, while mono-ethnic or administrative federations are constitutionally symmetrical. Burges identifies socio-economic and cultural-ideological preconditions for asymmetry (Burgess 2006: 215), which can be further broken down into political culture and traditions, social cleavages, territoriality, socio-economic factors and demographic patterns (Burgess 2009: 216). There are two types of asymmetry in federal systems, *de facto* and *de jure*, “the former refers to asymmetrical practice or relationships which result from the impact of the socio-economic and cultural-ideological preconditions ... while the latter is formally embedded in constitutional and legal processes so that constituent units are treated differently under the law” (Burgess 2006: 217). Indeed, asymmetrical federations serve better diversities yet preserve national unity.

These issues will be explored in further detail in our themed case study chapters but at this point it is sufficient to note what Liam Anderson regards as one of the problematic points relating to the development of the Iraqi constitution. In his view, there is insufficient asymmetry in regard to the Kurdistan Region. An earlier asymmetrical recognition of the Kurdistan Region in the Transitional Administrative Law was not incorporated into the Constitution of 2005. The rights accorded to the Kurdistan Region have now potentially been granted to all parts of Iraq although theoretically so far (L. Anderson 2010: 154). The issue that asymmetric federalism addresses, i.e. how to accommodate diversity, particularly where it involves territorially concentrated ethnic groups, is intimately related to what we now consider: the “paradox of federalism.”

## The “Paradox of Federalism”

Lawrence Anderson wonders: “Is federalism the best method of maintaining the territorial integrity of deeply divided nations or is it simply a halfway point on the road to secession and full independence?” And he wittily answers himself: “Ironically, the answer to both is yes” (Anderson 2005). Certainly, federalism can also involve a potential risk, as “federal arrangements can ultimately offer opportunities for ethnic nationalists to mobilize their resources” with a view to breaking away (Stepan 1999: 215). Federalism, warns Donald Horowitz, may be just “a resting point” on the road to secession (Horowitz 1985: 602). Federalism indeed may calm conflict inside the state, but only in the short run; while in the long term it is likely to facilitate secession, as federalism ultimately boils down to the creation of a state structure at the local level (Anderson 2005). Federalism lowers the costs of secession and may thereby facilitate, rather than eliminate, secessionist politics (Anderson 2005) and the federal structures can be readily used to break away from the federation.

Given the overall perceived and real palliative effect of federalism, it is rather ironic that ethnic federalism empowers groups and thereby actually increases the chances of secession. The exact same institutions that are meant to hold the country together by assuaging secessionism, to lessen or even remove the possibility of conflict, to cope with differences may actually backfire and work in the opposite direction. These institutions may freeze identities in a moment of time that potentially are fluid, give incentives for mobilization in favor of separation, and also provide an infrastructure that can be used to break away. These institutions can transfer into independence, thereby lowering the costs of secession. Federalism, Anderson notes, “might actually promote secessionism rather than avoid it” (Anderson 2010: 131). Many writers agree that federalism may quell domestic conflicts in the short run, but it will more likely contribute to separatism in the long run (Bunce and Watts 2005, Elazar 1984, Fabry 2008, Horowitz 1985).

In other words, federalism seems to be both secessionism constraining and secessionism encouraging arrangements at a time. These potential outcomes are known as the ‘paradox of federalism’ (Erk and Anderson 2009), since both ways are equally possible under federal arrangement. A key theoretical issue in the study of federalism, as pointed out by Filippov, Ordeshook and Shvetsova (2004) is “whether it is possible to design federal institutions” that would enable secessionism constraining only (Lawrence Anderson 2010: 126). Overly, federalism has been optimistically seen as a viable solution for deeply divided societies; particularly a society whose putative divisions are based on ethnicity or religion such as may be the case in Iraq. How the paradox of federalism will play out in a particular country depends on many variables, its origins being among the most important.

### The Importance of Federal Origins

Federations vary according to a set of ideas that serve as interpretive guides to make sense of the origins of federalism. For example, compact theory—the idea that a political union exists thanks to a bargain between sovereign or formerly sovereign political entities—is one of these central ideas. At first glance, it may appear that Iraq is “holding together” federalism, as Iraq has long existed as a unitary state and the federation was created to accommodate the Kurds and avoid a breakup of the country. There is enough evidence, however, to argue, in particular from the Kurdish perspective that Kurdistan came into the new Iraq from a *de facto* independence under the no-fly zone. Therefore, the Iraqi federation also fits the “coming together” type of federation, in a sense.

Qubad Talabani, the former Washington representative of a political party, the Patriotic Union of Kurdistan, now KRG representative to Washington, expresses the Kurdish perspective on the origins of Iraqi federalism well,

We feel that the Kurds made a concession to be part of Iraq. Not only to be part of Iraq but to actually help lead Iraq, to help reconstruct Iraq politically, economically and through its security services. But this has to come with the understanding that there is a region called the Region of Kurdistan, and it is an administrative region with its own parliament, with its own original government, with its own security forces, and it’s conceivable to think that this could be resolved and have a new system of administration in the north. (Federal News Service 2005, cited in Anderson 2007: 168)

This statement demonstrates a commitment to federalism and the desire to live in a reconstructed Iraq. It also points out that the Kurdistan Region had an independent existence prior to that and has consented to joining the new federal state (Anderson 2007: 168). It is also fair to mention that almost 40 percent of Iraqi Kurdistan’s territory was not covered by the no-fly zone and remained under Baghdad’s control. Therefore, rejoining with the rest of Iraq as a federal unit was also a pragmatic choice among other considerations.

There is a well-established body of literature, which attempts to identify the origins or common motivations for the establishment of political unions. David McKay (2009: 9) contends that William Riker’s work on federalism

... explains the decision to form federations in terms of the perceived costs and benefits to the negotiating parties. Federations ensue when the benefits of enlargement exceed the costs. Nascent federations are in danger of failing (or breaking up) when the costs borne by the component states are perceived to be greater than the benefits derived from the remaining in the federation.

In earlier versions of his thesis, Riker identified the avoidance of external threat as the only factor in the cost/benefit equation, which would place his work in the

realist school of thought. He does not, however, take the abstract notion of nation state as the basic unit of analysis, but rationally calculating individuals as key actors. Riker points out that it was the perceptions of the group of politicians, the Founding Fathers, rather than any abstract interests of the original 13 states, that led to the creation of the United States of America (McKay 2009: 9). According to McKay, Riker's work has "the merit of synthesizing the realist perspectives of international relations theory with the rational choice tradition in political science. It also had the advantage of stressing the agreed interest which the participants must have (or believe they have) before they cede power to a higher political authority" (McKay 2009).

McKay argues that Riker offers a coherent framework for the analysis not only of the origins of unions but also for identifying those conditions under which they are likely to survive (McKay 2009: 8–9). From this perspective, the Kurdistan Region will remain in Iraq as long as the individuals in the Kurdish political establishment perceive it is in their interest to do so although this may be articulated and presented as a Kurdish national interest. The political elite have greatly enriched themselves through the development of commercial opportunities, firstly, based on the revenues accruing to the Kurdistan Region from the 17 percent of all Iraq oil revenues and even more so with potential for exploration and exploitation of the hydrocarbon reserves located in the Kurdistan Region. Some of this filters down to the populace through a network of patronage connections promoting certain popular support for federalism.

To activate the positive aspect of federalism only, such as maintaining diversity, preventing conflicts and secession seems impossible. Scholars indeed have realized that the formal federal institutional setup does not always cut it; other variables are involved in preventing secession, like political will within sub-units, as well as uncodified economic and social factors (Erk et al. 2009: 196).

### *Institutional Setup*

A central theoretical question in the study of federalism remains whether it is possible to design institutions that are efficient in solving conflicts and stable over time that would take account of all these factors—political, economic and social (Filippov et al. 2004). Such questions figure prominently in the ongoing debate over federalism in countries as diverse as Iraq, Afghanistan, the European Union, Great Britain, Belgium, Spain and Canada (Anderson 2010: 126).

The nature of institutional design means that the propensity to secede will not only vary according to differences in the institutional setup, but the implementation will also vary over time as institutions—and their meanings—are transformed (Anderson 2010: 130). In Iraq there is an ongoing process of negotiation of the actual functions federal institutions created post-2003 should carry out; while some of the institutions mandated by the Constitution have not even been established, like the upper territorial chamber of the Iraqi parliament; some institutions in

charge of managing federal relations have been keeping low profile, eschewing matters related to federal relationships, like the Iraqi Supreme Court.

What if the paradox of federalism is resolved through outright secession as the only solution for protracted ethnic tensions and conflicts? That option looks clean and simple and a good alternative to war, but “there is no guarantee that it addresses the problem of ethnic diversity effectively” (Fessha 2010: 12) even less so the territorial integrity of the country. Therefore, political divorce should be considered as the last resort. There are two major obstacles to secession from the geopolitical standpoint: (1) the world map would need to be significantly redrawn with all geo-political consequences it would entail and (2) the emergence of a large number of unviable small states would create a mess in the international arena. Accordingly, the international community clearly favors federalism in order to maintain stability and order in the world (Fessha 2010: 13). The Iraqi constitution does not mention the right to secession of a region; therefore a unilateral secession of a region would be totally unconstitutional, similar to the Quebec situation in Canada (Canadian Supreme Court Judgment, Case Number 25506, 1998-08-20). The procedure of constitutional amendments affecting federal relations is intentionally made cumbersome and does not allow a federal unit alone to introduce such an amendment.

In the opinion of many, introducing federalism in Iraq was controversial and potentially laden with unintended negative consequences for the country and the region (Galbraith 2006, Anderson 2006, McGarry and O’Leary 2008). The country suffers from a deep rooted division based on ethnicity and religious sectarianism, which causes a significant degree of people’s disloyalty to the central government. Some believe that the original intent of the Iraqi constitution makers—to manage conflict, cease sectarian and ethnic violence and resolve the underlying causes—may ultimately lead to Kurdistan’s secession (Galbraith 2006, McGarry et al. 2008). Williams and Simpson claim altogether that Iraqi federalism will not end violence, as any ethno-sectarian federation does not account for the extensive non-ethno-sectarian motivated violence present in Iraq (Williams et al. 2008).

Creating a federal region in the north of Iraq was meant to keep the country from breaking up and satisfy the increasing demands of the Kurdish minority for more cultural and economic autonomy. The Iraqi constitution makers and their international assistants regarded federalism as one of possible solutions to keep the unity of the country. Federalism, as geographical power distribution that requires an increasing role of the judiciary, was also viewed as a step forward to establish quality democracy in Iraq (McGinnis et al. 2004).

Set inside this general framework of key theoretical issues in comparative federalism, we now turn to contextualize our themed case studies to focus more on literature that pertains to particular aspects of federalism in Iraq. Kurdistan, the only federated unit of Iraq so far, has taken significant measures to address security matters independently of the federal center, showed unusual activism in the international arena, additionally straining the federal relationship. An apple of discord between Erbil and Baghdad remains the sharing of revenue from oil

and gas. And finally, the combination in one constitutional system of overly contradictory principles—Islam and democracy—may become a time bomb with potential to pulverize the Iraqi federal architecture.

## **Federalism and Regions' Security**

A particularly pertinent notion related to federalism and security is that of societal security elaborated by Paul Roe (2005; 2010). In security studies, the referent object of security is generally taken to be conceived as absence of threat between states. In other meanings of the term, the referent object is intra-state threats, threats to a particular society from a particular group within the state which may have control of the state apparatus (Roe 2010: 209).

Security concerns and survival are the highest of all possible stakes. While state sovereignty is concerned with threats to its sovereignty—if a state loses its sovereignty, it will not survive as a state—societal security is concerned with threats to its identity—if a society loses its identity, it will not survive as a society. States can be made insecure through threats to their societies. But state security quite paradoxically can also be brought into question by excessive attempts to achieve a high level of societal cohesion. This relates to those instances where a state's program of homogenization comes into conflict with the strong identity of one or more of its minority groups (Roe 2010: 209).

Roe goes on to argue that most evidently societal identity can be defended using military means and most notably if identity is linked to territory. If the threat posed by one group to another can be carried out by armed forces, then some kind of armed response is necessary. In this case societal security dynamics will closely resemble armed aggression between states and defending societal identity resembles defending state sovereignty. Societal security considerations come to the fore in multi-ethnic states where societal insecurities are most clearly visible (Roe 2010: 210).

Roe (2010: 210) further articulates that

While some societies (as states or quasi-states) may very well have an army or at least some kind of militia that can be utilized for defense, the vast majority of intra-state groups possess no such exclusive means of protection. For them, members of the group will either make up part of the state's armed forces as a whole, or have military forces composed of the same ethnic group in a neighboring state. Facing a threat in identity terms, such groups are therefore left with two main options: first, they can try to form their own militia or defense force as a means of protection, although this can be extremely difficult; or second, they can try to defend their identity using non-military means.

In our case, the Kurds, under threat from the government in Baghdad created the *Peshmerga*, an armed militia, which has carried its existence into the federal

Iraq. Linking these two sets of literature on societal and institutional influences is Jan Erk's notion of congruence that "in the long run the political institutions of federalism adapt to achieve congruence with the underlying social structure ... Federalism is both a societal and an institutional phenomenon, and thus presents an area where the two can be studied together" (Erk 2009: 193). To place the issue of federalism and security in Iraq in the context of comparative federalism, a key work for assessing institutional arrangements is the volume *Distribution of powers and responsibilities in federal countries* (Majeed et al. 2006) with its country case studies including the USA, Switzerland, Germany and India.

The United States, as the first federal country, is still held up as an example for federal polities everywhere, and furthermore as Iraqi federalism has been created under its sponsorship, the relationship between Federal and State Guards in the USA is of interest.<sup>1</sup> Article 1, Section 8 of the Constitution grants 18 exclusive powers to the Congress of the United States, mostly concerning interstate commerce, foreign policy or military matters (Katz 2006: 300). The fact that the army should be excluded of internal security is also acknowledged under US regulation and the expression *Posse Comitatus*, a law 1878, which aimed to substantially limit the powers of the federal government to use the military for law enforcement. In September 2006, President Bush encouraged Congress to think about revising federal laws so that US armed forces could bring back public order and law enforcement at the state level following a natural disaster such as Hurricane Katrina (Roche 2011: 24).

One feature of the US federation can be used to justify the existence of provincial armed forces alongside the federal military—National Guard. The US federal experience in this respect can hardly be helpful for at least two reasons: (1) the United States is not an ethno-federation; (2) regional/state armed forces, national guards are not independent from the federal center. Even in the United States of America the role of state guards is quite singular. The National Guard is a unique state-based military force that is shared by the states and the federal center. It is also largely funded by the federal government and trained in accordance with federal standards (Lowenberg 2012). It is a ready and reliable force accessible to the states for both state and combined state and federal purposes and to the federal government for federal purposes (Lowenberg 2012). Article 1, Section 8 of the US Constitution (the Militia Clause) also authorizes the use of the National Guard under continuing state control but in the service of the federal government to "execute the laws of the Union, suppress insurrections and repel invasions" (Lowenberg 2012). In sum, the experience of the United States, one of the world's most successful federations, in which federal units seemingly have armed forces, cannot be used to justify the existence of the *Peshmarga* because National Guards are not independent of the federal center and because the USA is not an ethno-federation.

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1 Obviously, the insights of US federalism are quite limited for the study of ethno-federations of the "keeping-together" type.

Unlike the USA, Switzerland is a state composed of a number of ethnic territorially concentrated groups and has a national armed militia as its military forces (Fleiner 2006: 280–82). This is a result of the Constitution created in the aftermath of a civil war. Adhering to the principle of neutrality, the army's main functions are the prevention of war, the maintenance of peace, the defense of the country, and the protection of the population. As Switzerland has no federal level police force available, the Swiss army's role is also to support the civil authorities in maintaining internal security when this is under serious challenge (Article 58 [2]). A federal intervention may take place only when the internal stability of a Canton is threatened and cannot be protected and restored by the Canton alone or with the assistance of other Cantons (Article 52 [2]). The use of the army is an exclusive federal matter; the Federal Council is entitled to take measures to guarantee the external security, independence, and neutrality of Switzerland (Article 185 [1]).

The case of the Federal Republic of Germany is in some respect relevant to Iraq, as its federalism was born out of Allied invasion and occupation after WW II. The Constitution of the Federal Republic of Germany was drafted in 1948–49 following the instruction of the occupying allied powers. The Basic Law specifies only a few areas that are administered exclusively by the federal government such as the foreign service, border police, customs, armed forces and federal communication arteries such as roads and waterways. All other policy areas fall under the authority of the regional governments, the *Länder* (Schneider 2006: 125). No *Länder* possesses its own armed forces.

India presents an interesting and relevant case, as it allows consideration of the issues of federalism in the context of the developing world. In India's federal polity, the constitution validates the centralization of powers to the point that the federal government under certain special circumstances can temporarily assume the competences of the states. Such emergency situations include “war or external aggression or armed rebellion” (Article 352); “internal disturbance”; emergence of a situation in which the current state government cannot function or discharge its constitutional duties (Mathew 2006: 168). India has no security arrangements at the level of states and regions.

These points on constitutional arrangements in the USA, Switzerland, Germany and India concerning security highlights that a key concern of federal constitutions is to specify exactly the situation in which federal forces can intervene in regional security. In no existing federations, constituent units are endowed with their own security forces that could be used independently from the federal center, and this is particularly true for more delicate cases of ethnic federations. In Nigeria, for example, after the civil war of 1970–1972, the federal government assumed emergency powers allowing it to take over the security functions of sub-national governments, and these measures were not reversed after the war (Elaigwu 2006: 211).

## **Federalism and Regions' Diplomacy**

One of the most unmistakable signs of a federal unit's secessionist intentions is its activism in the international arena. The Kurdistan Regional Government has been often accused by Baghdad of harboring plans for breaking away specifically because of its activist and independent involvement in international relations and diplomacy.

Foreign policy making in federations has always been the prerogative of the central government, while occasional interactions with neighboring countries in transportation, trans-border trade are permitted because they are considered "low politics" (Michelmann 2007: 3). Typically, constitutions, Supreme Court rulings establish rather constricting limitations on foreign initiatives and actions by federated units. Only a few constitutions in the world, like German, Swiss and Belgian give constituent units certain leeway in foreign policy, including treaty making powers (Michelmann 2007: 5).

Federal units and central government are divided constitutionally with a clear specification of policy areas for each. In a classical territorial distribution of power, local institutions possess authority over regional policies, language, culture, education, healthcare, some economic regulations; while international relations and security matters remain the exclusive preserve of the federal center. Typically, federal constitutions leave no room to federated units for an independent foreign policy. However, current realities are such that we have been increasingly witnessing the involvement of sub-nation entities in the international arena.

Among the most important causes for the involvement of sub-state units in international relations the literature identifies growing economic interdependence, globalization, in other words mostly economic factors that are present nowadays almost in all federations from Russia to Belgium. Nationalism and national identity have rarely been considered a motive for federated units' engagement in international relations. Yet nationalism as the claim of the ethno-cultural uniqueness is unavoidably present in the interaction of an ethnic group with the outside world.

Scholars have studied nationalism from various angles and come to a shared conclusion that national identities directly and forcefully relate to social action and play a significant role in politics, in particular. The power of ethnicity and national identity was a variable of choice in the explanation of decolonization and associated political violence. Nationalism has recently taken a prominent place in democratic theory, as democracy is always linked to the mobilization of large masses of people. National identities and revived traditions have become topical themes of transition to democracy studies (Danilovich 2010).

Nationalism is a particularly important factor in nascent polities with no prior experience of statehood. Nationalizing elites in this case are desperate to create a nation-state at any price. Historically unrealized statehood makes them strive for the implementation of the highly normative concept of polity, in which nation and state coincide (Smith 1998). Creative historiography, myth-making, revived traditions, symbolism are widely employed to achieve this goal.

The engagement of ethnic federal regions in foreign policy has special reference to national identity and nationalism. One of the first scholars who have suggested systematically studying the cause-effect relationship between nationalism and foreign policy is Ilya Prizel. The main obstacle for connecting nationalism or national identity with foreign policy, he argues, is “that sociologists and political scientists who study nationalism rarely venture into foreign affairs as a major issue” (Prizel 1998: 2). The efforts of the Zionist movement to redefine and foster Jewish identity led to the formation of the Jewish state. Israel constitutes a perfect example of how national identity can influence international affairs.

Prizel argues that interaction between national identity and foreign policy is a key element in both established and nascent polities, but this interaction is particularly important in newly emerging or re-emerging states since nationalism and national identity are often the main, if not the sole force binding these societies together” (Prizel 1998: 2). “Therefore, continues Prizel, all polities, whether or not they are aware of it, have an identity that helps define their values and serves as the basis for ranking their priorities” (Prizel 1998: 2). The irrational and emotional sense of national identity “plays a vital role in forming a society’s perception of its environment and is an extremely important, if not driving, force behind the formation of its foreign policy ... ” (Prizel 1998: 2). Professor Prizel looks, however, at foreign policy driven by nationalism in independent and sovereign countries, like Poland and Ukraine, while similar efforts of sub-national, federal units and their engagement in foreign policy remain a rather enigmatic theme.

There are some similarities in the foreign policy of ethnic federal regions and independent but unrecognized states; in both cases foreign policy is aimed at (1) the search for recognition of their identities, (2) acquisition of material resources through foreign assistance and investment, (3) demonstration of their institutional and other capabilities to engage in international relations, which ultimately boils down to the recognition of their identities through *de facto* acceptance as international actors (Owtram 2010).

Overall, the literature on a possible cause-effect relationship between foreign policy and national identity is in an embryonic state. The question, where and when national identity can become a political force capable of pushing a sub-national unit to engage in international relations, the question, how much of nationalism, as opposed to other considerations, like growing economic interdependence, is responsible for that, waits for answers. Therefore, the case of Iraqi Kurdistan may help to gain a better understanding of how nationalism causes ethnic federated units to engage in international relations.

By the nature of involvement in foreign policy and its underlying causes two cases are particularly relevant to our discussion—Canadian Quebec and Belgium regions and communities. Both Quebec and the regions and communities in Belgium have a large number of representative offices abroad to strengthen their ties with foreign countries. Ethnicity and culture are among the main factors that cause these sub-national units to be active in international relations. Quebec with the majority of French Canadians seeks to build and strengthen relationships with

French-speaking countries within la Francophonie, achieve high international visibility and thereby strengthen their national identity abroad as well as at home. Ethnic and linguistic affinities play a crucial role in motivating the Belgian regions and communities toward undertaking foreign policy initiatives. For example, Wallonia tends to relate more with France while Flanders seeks more interaction with the Netherlands. These relations allow the keeping of cultural features, such as arts, music, architecture, food and clothing alive. Ethnic identities, not so much growing economic interdependence and globalization, determine the preferential relations of the federal units in these two cases.

The Canadian Constitution is rather vague over how much diplomacy the provinces can do. Although it grants the exclusive right over foreign policy to Ottawa, some provinces have gained a broad autonomy in this particular area mainly through judicial interpretations. Quebec has taken advantage of some constitutional ambiguities and gained prominence in independent foreign policy making. The Belgium constitution explicitly gives significant powers over foreign policy to its regions and communities, alongside the central government without having a hierarchical relationship between the two levels.

Under international law, there are some preconditions for sub-national units to be accepted as *bona fide* players in the international arena: (1) national constitutional provisions authorizing federated units to engage in international relations, and/or (2) recognition of federal regions by other subjects of international law. Recognition can be also gained through or as a consequence of practice. In other words, recognition is a matter of fact and practical relevance, rather than abstract theoretical postulates or even constitutional provisions.

Thus, the provinces in Canada and the regions and communities in Belgium have increasingly become recognized as international legal entities, with the ability to behave at the international level as autonomous actors alongside sovereign states to the point that they can sign international treaties. In Canada, the provinces have to consult with Ottawa over international treaties, but regulations in this area differ from one policy sector to another. Consultations between the federal government and provinces are not constitutionally mandated, but a good deal of consultative talks takes place.

The Belgium constitution explicitly states that the regions and communities can sign treaties on their own for the matters falling within their jurisdiction. In order to avoid incoherence in Belgian foreign policy, coordination procedures and mechanisms, mainly in the form of consultations, are also established. Meetings and annual conferences are held between officials from the central government and federal regions to coordinate their actions over foreign policy in order to keep it coherent.

In both Canada and Belgium, the relationship between the central government and the federal units has been reshaped and adjusted over time based on various considerations. Autonomy demands in Quebec are influenced by its cultural and linguistic distinctiveness vis-à-vis the rest of the Canadian provinces. Belgium is extremely fractured because it includes two geographically based linguistic clusters.

Among the most important factors behind their activism in the international arena are in both cases national identity and language. Both the Canadian and Belgian federal units have established links in France and Netherlands, their identity-close countries (Michelman 1990: 303–4).

Quebec is an excellent example of the cultural and linguistic dimension of its policies both foreign and domestic. There have been obvious excesses in asserting the French identity of Quebecois. Thus, the Charter of the French Language enacted in 1977 by the Quebec National Assembly declared French the official language of the province despite the country's official bilingualism. Some of these extravagancies have been struck down as unconstitutional by the Supreme Court, including the requirement of commercial signage to be in French only. At the same time other provisions, like the one that denied the federal government the ability to set up a common curriculum for schools and universities, the tool commonly used for nation-building, stay, as well as the Charter's requirements that new immigrants to Canada residing in Quebec should educate their children in French schools only.

Effective culturally driven sub-national diplomacy has become possible due to the development and increased sophistication of federal units' institutions and the growth of local budgets. Federal units' activism also escalates when there is perception of the federal government's inefficiency, limited resources and lack of expertise and experts. Institutional deficiencies at the federal level are sought to be compensated by units' international activism.

### **Revenue Sharing in Federations**

For a federation to be successful, its regional governments should have considerable financial powers that would allow them to make laws on issues specific to their region and raise revenues to implement them. If the regional government remains fully dependent on the federal center for revenue, it won't be able to carry out its own region-specific policies, and its political autonomy will be seriously undermined. Therefore, there should be established a fine relationship between the federal center and regions in the matter of funding and revenue sharing (Brancati 2004: 14).

Watts notes that “(1) the distribution of financial resources enables or constrains governments with regard to the exercise of their constitutionally assigned responsibilities; and (2) taxing powers and expenditure authority are themselves important instruments for affecting and regulating the economy” (Watts 2006: 332–5).

Most federations make clear in their constitutions or special statutes the revenue-raising powers of the two tiers of government. The key taxing powers are customs and excise, corporate income taxes, personal income taxes, and various sales and consumption taxes. A common feature of the allocation of fiscal powers is that the majority of revenue sources are allocated to the federal government. At the

same time, in Canada, Switzerland and the United States the regional governments possess powers of taxation in such areas as personal income taxes and sales and consumption taxes. If the levying and collecting of major taxes are concentrated in the federal government, as in Germany and India, there are mechanisms to disburse some of the proceeds of federal taxes to the states (Watts 2006: 332).

Watts argues that three factors have contributed to the concentration of the major taxing powers in federal governments. Firstly, the concentration of resources in the federal government is necessary if it is to act in the redistributive role often expected of it. Secondly, Keynesian theories dominant at the time of inception of many fiscal arrangements advocate federation-wide policies to promote economic stability and development across federations. Thirdly, to achieve economic union, tax harmonization is required. Regarding expenditures, in most federations the constitution does not set tight limits on government spending and constitutional courts have recognized some flexibility of central governments in federations. This could, however, become a way in which a federal government could achieve federal dominance (Watts 2006: 332–5).

Turning to the developing world, the sharing of revenue derived from natural resources among levels of government has been vital for federal systems in natural resource-rich countries such as Bolivia, Nigeria and Indonesia. If this issue is insufficiently resolved, it potentially places a great strain on the constituent units and nation unity (Ahmad and Brosio 2006: 25). This is because different areas can have uneven geological endowment and have location specific resource rents (Bishop and Shah 2008).

Furthermore, different stages of production, such as (refining and pipelines) may occur in different locations. Also resources are exhaustible and so there are diversification and inter-generational considerations. Revenues are highly volatile as resources are typically produced for export and globally traded. Oil and other minerals must be discovered and so there is a need for exploration incentives similar to research and development patents. Regulation and taxation affect timing and extent of exploration and production. Development involves local externalities, such as environmental degradation, for example, and governments must have correct incentives to regulate (Bishop and Shah 2008).

Ahmad and Brosio (2006: 25) concisely outline the key points on how revenue from natural resources impacts on federal states. They note that rents from natural resources can be of a high magnitude and when apportioned to local or regional governments can lead to great differences in income with non-producing regions. Decentralization increases the role of sub-national governments and leads them to demand greater share and control of revenues created in their area where their writ holds sway. Therefore mechanisms for managing the levying and sharing of rent among different levels of government need to be specified and agreed in detail. These tools can include tax and non-tax instruments, such as “auctioning exploration and exploitation rights, production-sharing agreements, and the acquisition of equity in natural resource extracting enterprises” (Ahmad and Brosio 2006: 25). The sharing of gross petroleum revenues, for example, could expose subnational

governments to the ups and downs of international prices that lead to unevenness in income during peaks and troughs (Ahmad and Brosio 2006: 25).

The comparative cases of Canada and Nigeria are particularly relevant. Both countries are ethno-federations; both possess large reserves of natural resources, particularly oil, and both have experienced contestation of federalism in the form of secessionist bids. Most of the problems that the Nigerian federation faces are due to the failure to find a balanced approach to revenue sharing. “The abandonment of true federalism in Nigeria has led to the neglect and marginalization of the Niger Delta region of Nigeria, where the bulk of the country’s wealth is produced” (Ebegbulem 2011: 218).

Canada is the world’s most fiscally decentralized federation. Simon and Papillon identify the Canadian federal government’s share of total direct public spending as 37 percent; in contrast to 61 percent in the United States; 53 percent, in Australia; and 41 percent, in Germany. Canadian provinces are largely self-sustainable financially. The federal share of taxing and spending peaked in the postwar period in Canada, when the welfare state was being constructed; since then spending has increased at provincial level (Simeon and Papillon 2006: 103–4).

Simeon and Papillon inform that Section 109 of the Canadian Constitution and the 1930 Natural Resources Transfer Agreements (NRTA) assign ownership concerning the extraction and commercialization of natural resources to provinces, except for offshore resources and uranium mining. The federal government regulates international and interprovincial transfers of energy through the National Energy Board. During the 1970s energy crisis, the Canadian federal government sought to use its powers over interprovincial and international trade to enhance the national dimension of energy policies and to insulate the industrial heartlands from the steep increase in the price of energy. The outcome was the National Energy Program, which promoted Canadian ownership of extraction and distribution industries and a strategy for the development of Arctic and offshore energy resources, which come under federal jurisdiction. In central Canada this was seen as a legitimate response to a national crisis whereas Alberta saw it as an infringement of its rights (Simeon and Papillon 2006: 107).

J. Isawa Elaigwu provides us with a succinct overview of federalism in Nigeria pertinent to our purposes. Nigeria has a three-level federal structure made up of the federal, state and local governments (Elaigwu 2006: 213). Nigerian federalism has been described as “cooperative,” but in fact it is politically and financially dominated by the federal government. According to the distribution of powers set forth by the 1999 Constitution, Nigeria is a centralized federation with strong unitary state elements in it. The over-centralization of power in the federal government is explained by extended periods of military rule. Yet there are proponents of centralism who advocate a strong federal government in order to overcome Nigeria’s history of political turmoil and civil war.

Conversely, there are complaints from subnational units over the current revenue allocation formula. State governors have made representations to the Revenue Mobilization, Allocation and Fiscal Commission and members of the

National Assembly to raise the states' portion of the Federal Authority to 40 percent. However, it is commonly held by Nigerians that among all three tiers of government there is a lack of urgency over the issue of revenue generation (Elaigwu 2006: 218). The distribution of resources is another bone of contention between the states and the federal center (Elaigwu 2006: 229–30). The 1999 Constitution provides for 13 percent of the Federal Authority to be paid to the states in which natural resources are exploited but the states situated next to offshore petroleum areas—the Niger-Delta States (Rivers, Delta, Akwa-Ibom and Bayelsa)—are very dissatisfied with this. They are highly critical of the federal government for going to the Supreme Court and obtaining a ruling which makes the distinction between onshore oil (13 percent of which was to go to the states in the form of mineral rents and royalties) and offshore oil (which was to go to the federation as a whole). The Supreme Court had judged in favor of the distinction, meaning that the littoral states (such as Akwa-Ibom) lost out on allocation of funds from the Federal Authority. Subsequently, a new law listing the distinction between onshore and offshore oil was enacted with which some littoral states were more content (Elaigwu 2006: 229–30).

This review of various experiences of federalizing natural resources shows that the matter is an essential component for successful federalism in both the developed and the developing world. Oil and water are the key natural resources in Iraq. The issue of federalization of natural resources in the new Iraqi federation is one of the most difficult for the different parties to resolve, evidenced by the lack of a national hydrocarbons law. Resolving this will require negotiations and the development of political trust, as at stakes are natural resources worth billions of dollars in the case of oil, or essential for life in the case of water. The ability of the Kurdistan Regional Government and Baghdad to make compromises has not been in much evidence so far.

## **Federalism in Theocratic Political Systems**

Federal design that recognizes, institutionalizes, and empowers differences (Choudry 2008: 146) can be achieved through a Meta Law resulting from a constitutional bargain. Federalism is constitutional in the sense that it runs deeper than daily politics, constitutional norms, “customs and culture place federalism beyond easy renegotiation” (Halberstam 2008). Unlike regular statutes, such as electoral law, the constitutional provisions on federalism remain immovable vis-à-vis political expediency of the day. At the same time, even the constitutional system should keep up with the ever-changing reality and be subject to upgrades, adjustment through various means. “A successful federal system must remain flexible enough to allow for effective governance and yet be stable enough to prevent radical centripetal or centrifugal shifts of power that undermine the principle of shared rule” (Halberstam 2008).

McGarry and O’Leary claim that “federation automatically implies a codified and written constitution and normally is accompanied at the federal level by a supreme court” to enforce it (McGarry et al. 2005: 263). The Supreme Court in a federal system is tasked with regulating and fine-tuning the federal relationship by umpiring differences between the governmental tiers. “The role of the judiciary in resolving conflicts between the federal and state or provincial governments, however, may differ across national systems according to historical, political, and legal factors” (Davis et al. 1989: 63).

Filippov (2004) argues that federal design cannot be sustained if there is no constitutional enforcement. In a federation, there are constant conflicts over which level of government has the power to act in a particular situation. No other branch of government, except for the judiciary, can be the final umpire in such disputes. Constitutional interpretation is the prerogative of the highest court of a country’s judiciary. The primary role of the federal Supreme Court is to be the guardian of the constitution. The Court has the role of “interpreting the constitution (federalism and human rights) within constantly changing contexts” (Des Rosiers 2010).

There are however a lot of disagreements over the role of the federal judiciary in federations; some claim that the central judiciary is essential for successful federations, like in the case of the USA; others argue that it is unnecessary and possibly harmful for the federation, because the central judiciary is biased in favor of the central government. Yet others believe that federations should be free associations that need no protection under Meta Law, nor by a constitutional court (Halberstam 2008, Schmitt 1985). A sound federal relationship implies legalism, as a civilizational feature, or as Dicey put it, “the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people” only in this case federalism is preserved (Dicey 1959: 175). In the Middle East, however, liberal legalism, as a civilizational feature, remains in short supply.

Indeed, many in Kurdistan are suspicious of the federal government and fear that one day when the central government in Baghdad becomes stronger, it will stop playing the federal game and will curtail the autonomy of Iraqi Kurdistan. On the other hand, relying on political safeguards of Iraqi federalism, as opposed to constitutionalism, cannot appeal to the Kurds, as they are a minority in Iraq and will lose any national plebiscite on the issue of federal autonomy. Only a written constitution, a duly constituted federal territorial chamber of parliament and an active Supreme Court may create solid bulwarks against reverting to the old policy of assimilative integration. But for that to happen, the current Supreme Court should not be perceived as an agent of the central government and should not be attached to the central government, but be jointly appointed. In Canada, the Supreme Court membership is quoted by a federal statute so that there are always three justices from Quebec out of the overall nine judges, while proportionally, there would be only maximum two. Since the Canadian upper chamber of parliament is not a federal territorially determined chamber, Quebec representation on the Supreme Court is very important as the Court is the final umpire over the federal power division and the federal relationship in general.

The Iraqi Constitution endows the Federal Supreme Court with a strong American-style review power, including in the context of federal relations.

Article 13:

Second: No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.

Article 93: The Federal Supreme Court shall have jurisdiction over the following:

First: Overseeing the constitutionality of laws and regulations in effect

Fourth: Settling disputes arising between the federal government and the governments of regions ...

Although federated units are entitled to make and enact laws, federal jurisdiction remains significant—criminal law, immigration law, international trade, macroeconomic policy, foreign policy and defense—all are the products of federal lawmaking. Iraqi Kurdistan has been given exclusive and concurrent jurisdiction over many policy areas, including language, education, and other cultural attributes. There is however one aspect of Iraqi constitutionalism that places additional and contradictory obligations on the Federal Supreme Court that can be very consequential for the Iraqi federation.

#### *A New Brand of Constitutionalism: the Combination of Islam and Democracy*

The new Iraqi constitution has adopted two distinct, if not contradictory, sets of foundational principles. It re-established Islam as Iraq's state religion and incorporated liberal principles, proclaiming both "the foundation for legislation." The Iraqi constitution seems to lay conflicting principles in its constitutional groundwork. In the words of Juan Cole, this is "an attempt in the Islamic world to engage with the ideals of Jean-Jacques Rousseau" (Cole 2005: 5). Such constitutional experiment appears to Cole as the most promising in modern history. Obviously, the mix of contradictory principles in the fundamental law of the land may have a direct bearing on Iraqi federalism, as any piece of legislation enacted, say, by the Kurdish parliament has to simultaneously be in line with both Islamic and liberal constitutional principles. Therefore, an activist Supreme Court can choose to strike Kurdish laws as unconstitutional at will, damaging the fragile federal relations.

Can the spirit of a western style federal constitution be imported or emerge by itself in Islamic states given the overall dismal record of previous attempts? The religious and philosophical background of Western federalism is based on the principle of the separation of powers, while such separation seems impossible in Islam where secular and religious authorities are same (Habib 2009). Therefore the enforcement of the federal constitutional system by the judiciary appears already problematic.

The 2004 Afghan Constitution contains similar contradictions, as it was also drafted "by a commission with foreign advice" in relative secrecy (Ginsburg

et al. 2009: 204). The degree of public participation in constitution making if a country is under occupation does not make much difference anyway (Ginsburg et al. 2009: 208). Generally, external influence on constitution-making “needs not be as blatant as in occupation constitutions” (Ginsburg et al 2009: 209), but in Afghanistan and Iraq the conditions under which the constitution was adopted were pretty similar in that respect. The US desire to quickly restore Afghan statehood and to save face resulted in such ideological incoherence, inconsistencies and civilizational mismatch of the constitution.

The 2005 Iraqi Constitution that was also adopted under occupation is the second case in recent history when constitution makers introduced conflicting constitutional principles by proclaiming both Shari'a and democracy the framework and sources of legislation. As any democratic constitution, the Iraqi fundamental law contains an elaborate Bill of Rights in Section II: Rights and Liberties. Conflict between the Bill of Rights, liberal in essence, and the constitutional proclamation of a state religion is stark. The Bill of Rights rests on the idea that religious beliefs are private matters while the state remains impartial among possibly conflicting religious beliefs and doctrines (Choudry 2008: 11). On the other hand, Shari'a characteristic feature is its historical tradition that discriminates on religious grounds, “a conflict arises between upholding Shari'a and protecting religious freedom” (Emon 2008: 258). The constitutional incorporation of Shari'a accommodates the dominant religious group and discriminates vulnerable religious minorities (Emon 2008: 259) and what is more important in our case, places contradictory obligations on the government.

There is no doubt that dominant religions have used through history a superiority/inferiority dichotomy to maintain social relations. Therefore, making a religion the basis of a constitutional system invites troubles. Contemporary Christian societies while forming government avoid making their religion a constitutional basis; liberalism has removed religion from the public domain in order to make all equal before the law. Obviously, a strong Christian background is omnipresent in Western countries not only in private, but also public life, ranging from the Lord's Day (Sunday) to other religious public holidays and beyond.

Alexis de Tocqueville pointed to the connection of American constitutionalism, including its federal character, to its Christian faith. Constitutionalism in America emerged and has been successful because the country's political order rests on a commonly held belief in God. But these beliefs in Christianity cover only the relationship with God and between man and man. “Beyond that, they teach nothing and do not oblige people to believe anything ... “ While in Islam the situation is radically different, continues de Tocqueville, “Muhammad brought down from heaven and put into the Koran not religious doctrines only, but political maxims, criminal and civil laws, and scientific theories” (Tocqueville 1969: 445). In any event, “for most of Christian history it has been understood as authorizing the separate coexistence of two authorities, the one charged with matters of religion, the other with what we would nowadays call politics” (Lewis 2002: 97). Unlike Christ, Muhammad was a founder of both a religion and a polity (Medina) and

head of a vast and expanding empire (Habib 2009: 537). Therefore, the whole idea of federalism whose key principle is decentralization could stem from Christian tradition, not Muslim. This circumstance may significantly undermine the viability of federalism in Muslim societies.

Islam must not distinguish “between affairs of the spirit and the affairs of the world,” religion must be politicized; the Islamic community makes no distinction between secular and religious power (Mahdi 1964: 247; Kubba 1996). “The Islamic approach to politics derives from the religion and the experience of past generations of Muslims, just as the triumph of American federalism marks the transformation of the separation of church and state in Christendom into a form of constitutional democracy in the United States” (Habib 2009: 548). Christianity has undergone the Reformation and Enlightenment, something that have no parallel in the Islamic world (Habib 2009: 538). Democracy expresses the will of the people, rather than the will of God (Habib 2009: 540). From the perspective of Islam, there is “no human legislative power, and there is only one law for the believers—the Holy Law of God, promulgated by revelations” (Lewis 2002: 101).

Islam has also known periods of disunity when tribal loyalties and identities superseded devotion to God, and it looks like now Kurdish tribal loyalty and Kurdish identity and unrealized statehood seem to lessen their commitment to the community of the faithful. Maybe this can explain the enactment by the Kurdistan’s parliament of several bills that are counter to Shari'a tenets, like a ban on honor killing and a partial ban on polygamy.

Some scholars argue that Islam has various sects and interpretations, therefore, its beliefs can be easily misunderstood by outsiders: one possible interpretation can turn things from rather innocuous into offensive. Anver Emon analyzes three possible interpretations of a Quranic verse regarding the state of submission of non-Muslims to Muslims (Quran 9:29). One interpretation argues that non-Muslims “must walk on the sides and edges of a pathway, while the honor of walking in the middle of the roadway is reserved for Muslim passersby . . . ” (Emon 2008: 273). The second interpretation argues that the verse simply means that the non-Muslim obeys the rule of law in order to remain a full member of society; the non-Muslim must abide by Shari'a. In other words, Muslim and non-Muslim are governed by same laws, nothing more. The third interpretation of the same verse argues that this verse implies nothing bad for the stranger at all. It only gives non-Muslims the incentive to convert to Islam (Emon 274). In the end, all these interpretations are not contradictory, but quite coherent, all point in the same direction.

Scholars have noticed long ago that in Islam there is a strong historic connection between religion and politics (Tessler 2002). Contemporary Islam, more than other living religions, is pertaining to societal organization, as well as individual morality. Kamrava asserts that the role of Islam in defining politics is more prominent than in other traditions (Kamrava 1999). The biggest challenge to the peaceful and successful coexistence of Islam and liberalism in one constitutional system is the culture of Islam, which rejects any distinction between religious society and political community. In fact, Islam is as much private as public matter

and does not distinguish between private and public domains when Shari'a goes into detail explaining how you should maintain your daily hygiene, have sex with your wife, on one hand, and how justice should be served in society, on the other.

Echoing Samuel Huntington, Al Sulani categorically asserts that the sphere of politics and religion are separate in democracy while in Islam they are one. As long as Islam is involved in public domain, there is not prospect for a Muslim country to become a democracy (Al Sulani 2005). Yet many contemporary Islamic countries have adopted Western institutions and procedures, their bureaucracies seem as efficient as in other places. Many common Muslim believers do not perceive any fundamental conceptual conflict between Islamic tenets and democratic principles. The majority in Egypt and Jordan showed simultaneous support for Islam and democracy (Jamal 2006). New developments, including the Arab Spring, have demonstrated significant potential for democracy in Islamic societies. "Within the limited space of a semi-democratic electoral regime [in Algeria], Islamist political parties that once espoused an exclusive religious ideology have exercised power in democratic ways, growing in their recognition of the legitimacy of nonreligious political parties and generally promoting the political rights of nonreligious individuals" (Driessen 2012: 187).

Professor Gould attempts to examine whether Shari'a can constitute a basis for constitutional regime and whether Islamic constitutionalism can be integrated into liberal constitutionalism. He is mostly concerned about making American Muslims feel at home in the USA, or in his own words, "for the full inclusion of Muslims within a viable constitutional system" (Gould 2011: 6). Gould puts forward the idea supported by Weber, Ely, Habermas and others that liberal constitutionalism is based on formal, rational legal procedure, or what is typically referred to as due process. "The laws are treated as legitimate when they are the outcome of formally-rational processes" (Gould 2011: 7). With some help from Weber, Gould argues that originally laws were considered legitimate only when they were consistent with societal values. But as traditional values waned in importance, they were increasingly replaced by procedures. New laws are considered legitimate only on the procedural basis, in other words, only when the procedure during its enactment has been followed. "Thus, moral obligation appears to give way to procedural rationality ..." (Gould 2011: 7).

Na'im (2008: 2) in his work on the role of Islam in Africa noted that a "process based on constitutionalism" is superior to a value-centered one, therefore, he suggested to use Islam not as a source of laws, but as a social facilitator for the development of a constitutional system (Na'im 2005: 99). Later in his *Islam and the Secular State* Na'im (2008: 2) begins his argument with an open call to separate Islam from the state, "Sharia cannot be codified as a constitutional law." Sharia, as he defines it, refers to the religious laws in Islam which is the human interpretation of the Quran. He concludes that for the best of the Muslim society a secular state is needed (Na'im 2008).

Tibi concurs with Na'im by claiming that there is a conflict between Islam and the modern state. He calls it a conflict between Shariazation of Islam and

constitutionalism (Tibi 2010: 155). The Shariaization of Islam, as he puts it, is the exact opposite of a secular modern law. In this sense, he argues, Shari'a as a constitutional law will prevent the introduction of modernity. "Today in the context of Islamic revival, the concentration is expressed within the framework of the return of the sacred" (2009: 27–8). He links this to the interaction with the rest of the world that developed modern secular laws based on codified norms.

Another point made by Tibi in his work *The Politicization of Islam into Islamism* is the trend to politicize Islam (Tibi 2010: 156). He distinguishes between the socio-cultural aspects of Islam, on one hand, and Islamism, on the other. The latter is the politicization of Islam through religious education and other forms of socialization. The politicization of Islam and the revival of Islamic governments and states are well illustrated by the current political system in Iran. The Islamist supporters in Iran eventually ended up creating Islamist theocracy, a political system of hierarchical Islam within a state (Ayubi 2005: 1). Many in Iraq fear that a suddenly active Federal Supreme Court with the majority of Shi'a justices will enforce only "the established provisions of Islam" at the detriment of the constitution's liberal component, something that will also affect federal relations.

This extensive literature review provides an explanatory framework within which we examine our empirical cases relating to various aspects of Iraqi fledgling federalism. We look at how the paradox of federalism plays out in the Iraqi context by focusing on its most acute features—regional security arrangements, regional foreign policy activism, natural resource sharing and federal implications of a constitutional system that combines contradictory principles in its very foundation—Islam and liberal democracy.

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## Chapter 2

# Introducing Iraq's Federal System

In this section, we will overview the main features of the Iraqi federal system, providing a necessary background for our examination of its most controversial aspects.

### **Constitutional Provisions on Federalism and the “Federal Law”**

The relationship between the Kurds and Arabs within Iraq has ranged from violent uprisings in the 1960s to administrative autonomy in the 1970s (promised but never realized under the Saddam regime), a bitter standoff in the 1980s that culminated in the use of chemical weapons against Kurdish civilians, to a no-fly zone in 1991 and a loose federation since 2005. Iraqi Kurdistan acquired its *de facto* autonomy after the Gulf War in 1991, and was, in a sense, detached from the rest of the country by the establishment of a no-fly zone under UN Resolution 688.

The Iraqi federal constitution was adopted through a referendum in 2005, in the aftermath of a devastating war and regime change that worsened the country's severe disunity. The process of constitution-making was sponsored by the occupying power and was, at some point in time, rushed to meet the deadline set by the Coalition Provisional Authority. The Arab Sunnis, the former regime's powerbase, largely boycotted constitution-making and the referendum. Therefore, some claim that many constitutional provisions do not take account of the reality in place and reflect the constitution makers' wishful thinking.

According to the new constitution, Iraq is an Islamic, democratic, federal and parliamentary republic. Its new political system and form of government constitute a radical departure from the tradition of Iraqi statehood and political regime in place before. During the Republic of Iraq (1968 to 2003), its political system was secular, unitary and presidential. The current constitution can be amended via a rather comprehensive and simple procedure, except for the fundamental constitutional principles stated in Section One—Islamic, democratic, federal and parliamentary—as well as Section Two, which guarantees rights and liberties. To protect federalism, the constitution reiterates in an additional provision, Article 126, that the constitution cannot be amended “if such amendments take away the powers of the regions.”

The new Iraqi federal system has in its origins as much of holding-together as coming-together efforts. The previous existence of Iraqi Kurdistan as an integral part of Iraq, the introduction of the no-fly zone in 1991, and then a direct military invasion and subsequent occupation in 2003 blurred the distinction between the

two different origins of federalism. The Iraqi federation was conceived by domestic actors as a step to assuage the unforgiving rivalry between Kurds and Arabs and, on the other hand, it was imposed by external forces. That makes Iraqi federalism a hybrid type where “coming-together” and “holding-together” considerations are combined. The introduction of multilevel governance was meant to diffuse ethnic conflict in the first place and solve “a high degree of ethno-religious complexity” (Visser 2008:1).

Article 117 reflects this situation well:

First: This constitution, upon coming into forces, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region.

Second: This Constitution shall affirm new regions established in accordance with its provisions.

As of today, the Iraqi federal system is more of a federacy than a multi-unit federation, as there is only one federated region—Kurdistan. In other words, the federal Islamic Republic of Iraq consists of two parts: the main Iraq, made of 15 administrative units called governorates, and the federal Kurdistan Region, composed of three governorates. As we have seen above, the constitution allows other governorates to organize in new federal units, with only one logical exception—the governorate of Baghdad where the national capital is located.

The constitution-makers took account of Iraq’s Kurdistan particular relationship with the rest of the country and consented to the creation of one federal region, but at the same time they permitted the creation of other federal regions, granting them similar autonomy to that of Kurdistan. Put differently, the constitution has created a federacy, which implies asymmetrical federal relations, yet it allows for an extension of federalism to other regions with the same degree of autonomy as in Iraqi Kurdistan, potentially making Iraq a symmetrical federation, in which all federal units enjoy the same autonomy and have a similar relationship with the federal center. In theory, Iraqi federalism is designed as symmetrical, but as of today with only one federal region, the actual federal relationship remains asymmetrical.

The procedure of forming new federal regions is outlined in the constitution and is straightforward: one or more governorates have the right to become a federal region. It takes “1/3 of the council members of each governorate intending to form a region” or 1/10 of the eligible voters in each of the governorates intending to form a federal region to make a request. Thus, the further federalization of Iraq is made quite easy. Although the Iraqi constitution sets forth a simple procedure of further devolution of power, it states that the process should be governed by a special federal law to be enacted by the Iraqi legislature within six months after the parliament first convenes following the adoption of the constitution. In accordance with this provision, the national parliament, known as the Council of Representatives, enacted a law in 2006 that details the rules and procedures to be followed for establishing other federal regions, called “Federalism Law.”

As the idea of federalism is contrary to the Iraqi tradition of a highly centralized state, the enactment of the Federalism Law was rather difficult and was surrounded by controversy. First, it took place under occupation; second, its enactment was carried out amidst protests and boycotts. Therefore, in the opinion of many Iraqis, the Federalism Law is not fully legitimate. Many political parties had put up a virulent opposition to the very principle of federalism, fearing that the sectarian federalization of the country would be unhelpful to the nascent process of national reconciliation. Some details of the adoption of the law are rather telling. The minimum threshold for the law to pass was 138 out of the 275 deputies who actually took part in the vote. By some accounts, undecided deputies were dragged into the hall where the voting took place while observers and journalists were not given access to the proceedings (Visser 2006). Many lawmakers from the Iraqi Accord Front, Islamic Virtue Party and Sadr Movement adamantly opposed the adoption of the law. They believed the Federalism Law would lead to an obstructive partitioning of their country.

In its essence, the Federalism Law details the procedure of establishing new federal regions, in addition to the constitutionally authorized Kurdistan federal region: a new autonomous region can be formed out of one or more governorates, a governorate can join an already existing federal unit. The method is rather forthright, but requires a referendum in the affected governorates and needs a simple majority to pass.

No wonder that since the introduction of federalism in Iraq through the adoption of the 2005 Constitution and the enactment of the Federalism Law in 2006, the idea of further federalization has been caught up in Iraqi domestic politics. The central government dominated by the Shi'a majority has been blackmailed by various groups that threaten to proclaim new autonomous regions. Thus, in June 2011, the Sunni speaker of the Iraqi parliament said that the Sunni community might wish to seek the formation of a Sunni federal region out of the Sunni-dominated governorates in the center of the country—Salahadin, Anbar, Nineveh and Diyala. Curiously enough, the Sunni minority had adamantly advocated a unitary Iraq, vehemently opposed the very idea of power devolution and pursued assimilation policy towards minorities when in power under Saddam Hussein. In the struggle for power, Sunni politicians have gone full circle with regard to decentralization and federalism. Hilterman et al. describe this metamorphosis as follows:

[At first] ... a powerful group of Shia Islamists openly championed the Kurdish-inspired model of ethno-sectarian federalism as a hedge against the return of a Sunni strongman, such as Saddam Hussein. Now, however, with U.S. troops gone, Iraq's Sunni-majority provinces worry about an unchecked and autocratic Shia-led government in Baghdad. Despite their emotional attachment to the notion of a centralized Iraq, leading national Sunni politicians and local leaders have now challenged Baghdad by issuing symbolic declarations of provincial autonomy. (Hilterman et al. 2012)

Reflecting on the further federalization of Iraq, some analysts believe that using the formula “one-size-fits-all style autonomy” can indeed threaten the survival of the country. Hilterman et al (2012) are convinced that this formula demonstrates “intrinsic flaws” in Iraq’s federal design. It would have been more reasonable for the constitution-makers to introduce an asymmetrical federalism that would treat the Kurdistan Region preferentially as opposed to other would-be federal units. This is because, by the time of constitution writing, the Kurds already had a particular status in the country achieved through their persistence, fight and international support and, in a sense, rejoined Iraq as a coming-together federal unit. Asymmetrical federalism would acknowledge the Kurdistan federal region’s particular status and thereby would help to avoid tensions between Erbil and Baghdad. The asymmetrical model could also “recognize the unique oil-contracting abilities of the KRG while also safeguarding Baghdad’s fiscal and monetary powers as well as authority over oil contracting elsewhere” [in other would-be federal regions] (Hilterman et al 2012).

As of today, Iraqi federalism remains a federacy with the Kurdistan Region being the only federated unit, while a few rather furtive attempts to establish new federated regions have not been seriously pursued.

## **The Federal Government**

The Iraqi constitution introduces a parliamentary republic, in which the federal legislative and representative branch is to comprise a Council of Representatives (lower chamber) and a Federal Council (upper chamber). The Council of Representatives shall consist of “a number of members, at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraq people” (Article 49), while the Federation Council shall “include representatives from the regions and the governorates that are not organized in a region” (Article 65). Unlike the Council of Representatives that has been formed and successfully functioning since 2005, the Federation Council remains on paper only.

The federal executive consists of the President—a significantly symbolic figure under parliamentary supremacy, elected by a qualified majority of the Council of Representatives—and the cabinet, formed by the majority block in the parliament. The term in office of both the president and the prime minister ends with the expiration of the Council of Representatives mandate. Prior to the 2010 legislative elections, the Iraqi Presidency was assumed by a presidency council made of three individuals: the president and two vice-presidents, each representing three main ethno-sectarian communities—Kurdish, Sunni and Shi'a. All members of the Presidency Council had veto power. In other words, any piece of legislation passed by the Council of Representatives had to be unanimously approved by the Presidency Council.

Interestingly enough, Kurdish Jalal Talabani has been Iraq’s president since the introduction of the Presidential Council under the Transitional Administrative

Law that preceded the 2005 constitution. In accordance with Article 138 of the permanent 2005 constitution, the provisional Presidential Council had to be replaced by a presidency assumed by one individual following “one successive term after this constitution comes into force.” In other words, after the reelection of Jalal Talabani in 2010, the president can sign bills passed by the parliament without concurrent unanimity of his two vice-presidents.

The constitution accords an outstanding role to the new Iraqi judiciary, which is rather unusual given the fact that Iraq is a parliamentary republic, a system that always has what constitutional scholars call “parliamentary supremacy.”<sup>1</sup> The federal judiciary is proclaimed independent and consists of the Higher Judicial Council in charge of overseeing the federal judiciary and managing its budget, as well as the Federal Supreme Court, made of nine justices who are experts in Islamic jurisprudence and legal scholars. In spite of parliamentary supremacy, the Constitution endows the Supreme Court with exceptional judicial review powers. The Supreme Court carries out all the usual duties of constitutional courts in the world, and is also tasked to oversee the constitutionality of laws and regulations in effect—in other words, judicial review after enactment.<sup>2</sup> It also regulates the relationships between the federal judiciary and the judicial institutions of the regions and governorates, as well as settles disputes that arise between the federal government and the governments of the regions and governorates, municipalities and local administrations. The Court is also expected to resolve matters that arise from the application of the federal laws, regulations, instructions, and procedures issued by the federal authority. Unlike the US Supreme Court, its Iraqi counterpart is not the highest appellate court. The Iraqi court system has a specialized court for that matter, the appellate court of the highest instance—the Federal Supreme Court of Cassation.

Given the strong review power of the Supreme Court, and the contradictory obligations under a constitution that proclaims both Islam and liberal democracy as the foundation for legislation, the composition of the Court is very important. The type of jurists that will evaluate, interpret, and apply constitutional principles will determine what Iraq is destined to become in the near future. So far, the seats have been divided among the sects, ethnicities and political parties—Shia, Sunni, Kurds and Turkmen—but “Shia Islamic jurists dominate the institution” (Barzini 2012).

Local legal scholars believe that this is a temporary arrangement to deal with political instability in Iraq, and the future Court will be staffed so that it can discharge

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1 Under parliamentary supremacy, the relationship between the legislature and the judiciary can be described as a “principal-agent” relationship. In such a system, judicial review of enacted legislation is impossible, while the Iraqi constitution grants judicial review power to the Supreme Court that can review legislation post-enactment.

2 This type of review means that courts can strike legislative acts enacted by the parliament as unconstitutional and thereby undermine parliamentary supremacy in the system. This type of strong review is characteristic of the US constitutional system.

its duties based solely on the law as mandated by the constitution. However, eight years after the ratification of the constitution, “the legislature remains unable to reach sufficient consensus to enact a law to create the Federal Supreme Court envisioned by the Constitution” (Hamoudi, 2011: 109). In 2011, the Iraqi federal parliament presented a new proposal, which addresses the problem of staffing the Supreme Court. According to the draft, the Court will consist of nine judges and a four-member advisory board—two legal specialists and two specialists in Islamic law. The Board would not take part in deciding cases.

### **Non-Implementation of Certain Constitutional Provisions**

Several constitutional provisions have not been fully implemented in spite of Article 144 that reads: “This Constitution shall come in force after the approval of the people thereon in a general referendum . . .” The most important unimplemented provision relevant to the topic of this book is spelled out in Article 48, “The federal legislative power shall consist of the Council of Representatives and the Federation Council,” and Article 65:

A legislative council shall be established named the “Federation Council,” to include representatives from the regions and the governorates that are not organized in a region.

A law, enacted by a two-thirds majority of the members of the Council of Representatives, shall regulate the formation of the Federation Council, its membership conditions, its competencies, and all that is connected with it.

As of the summer of 2013, the federal chamber has not been established, leaving the federal relationship largely unregulated and unmediated by a formal state institution, as mandated by the Constitution. No wonder that quite often the central government in Baghdad may selectively apply certain constitutional requirements, as does the KRG in Erbil. This situation can be illustrated with reference to the language provision of the constitution. In accordance with Article 4 of the federal constitution, the Arabic language and the Kurdish language are the two official languages of Iraq. The scope of the term “official language” includes the following:

- A. Publication of the Official Gazette, in the two languages (not implemented).
- C. Recognition and publication of official documents and correspondence in the two languages (not implemented).
- E. Use of both languages in any matter enjoined by the principle of equality such as bank notes, passports, and stamps (not implemented).
- The federal and official institutions and agencies in the Kurdistan region shall use both languages (not implemented).

Even in Iraqi Kurdistan many official documents are still done in Arabic only. For example, my vehicle registration certificate issued by the traffic police in Erbil is written in Arabic.

Out of security concerns, the KRG has introduced a registration procedure for Iraqi citizens visiting the Kurdistan Region, a visa-like residence permit. This practice is standard for foreigners, but is unconstitutional in its application to Iraqi citizens, as Article 24 and Article 44 of the federal constitution guarantee the freedom of movement, travel and residence within the country. This is done for obvious reasons—improving security.

Yet another recent instance of constitutional non-compliance was a significant delay in the formation of a national cabinet after the 2010 legislative elections. It took almost 10 months, much longer than what is required by the constitution; the constitution prescribes for this process a period not exceeding 90 days, all eventualities considered. This particular cabinet crisis was resolved with some help from the Iraqi Federal Supreme Court, which gave a judicial opinion on Article 76 of the Constitution concerning the nomination of the Prime Minister.

A big blow to Iraqi constitutionalism has been dealt by the non-implementation of Article 140, which mandates the resolution of the thorny issue of disputed territories, Kirkuk in particular<sup>3</sup>. The Constitution requires the federal government to conduct a referendum in the disputed territories and implement its results by a specific date, December 31, 2007. It should be reminded that in the aftermath of the parliamentary crisis followed by Iraq's general elections in 2010, the KRG and Baghdad had signed an agreement called the Erbil Agreement. As part of this agreement, Kurdish officials promised to back Prime Minister Nuri Maliki to form a cabinet on the condition that he would implement Article 140 (Alsabawi 2012), which he did not. The non-execution of this high profile constitutional provision keeps protracted tensions lingering and sends a very negative message to all Iraqis that the constitution is not saint and sacred and may be simply ignored. The whole situation has been summarized by Kurdish Prime Minister Nechirvan Barzani, who once angrily said,

The Iraqi Constitution is constantly violated and the Erbil Agreement, which was the basis upon which the current government was formed, has been completely ignored. As soon as they [al Maliki and his team] came to power, they disregarded the Constitution . . . (Barzani 2012)

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3 Kurds claim that as a result of the Arabization campaign in the 1960–70s the ethnic balance in many areas and localities in Northern Iraq had been tilted in favor of Arabs. The oil-rich Kirkuk region is one of those areas.

## **The Absence of Kurdistan's Written Constitution and Regional Government**

The absence of the Kurdistan Region's own constitution for almost a decade of existence within the federal Iraq can be also considered a non-implementation of the federal constitution, whose Article 120 reads:

Each region shall adopt a constitution of its own that defines the structure of powers of the region, its authorities, and the mechanisms for exercising such authorities, provided that it does not contradict this Constitution.

Politics within the Kurdistan Region seem less formally regulated than at the national level, as the Kurdistan Federal Region does not have an enacted constitution. In a sense, the current political system in Iraqi Kurdistan holds on gentlemen agreements, treaties between political parties, legislative acts, executive orders and cabinet edicts. In fact, the bulk of the framework within which politics unfolds in the Iraqi Kurdistan federal region is made of the 2006 PUK-KDP Reunification Accord. This agreement was concluded early in 2006 in an effort to stop the interethnic hostilities between the Kurdistan Democratic Party and the Patriotic Union of Kurdistan that had ravaged the region for over a decade. It was also meant to concert Kurdistan's efforts "in dealing with the central government" and to act as a united front in Baghdad (Ahmed 2012: 12). This accord ended open hostilities between the two main political forces, but largely reduced Kurdish politics to the activities of the two parties, leaving out other smaller political groups.

Several attempts to adopt a regional constitution have failed. It is fair to note that a constitutional draft was prepared and first published in February 2006. It was approved by the parliament in June 2009 and was meant to be enacted in a regional referendum scheduled at the same time as Kurdistan's provincial legislative elections on July 25, 2009. However, serious obstacles to the adoption of the regional constitution arose with the emergence of strong opposition party Gorran (Change) in Kurdistan, which questioned the whole political framework in the region that resulted from the 2006 PUK-KDP Reunification Accord. It favored a real parliamentary system, as opposed to the *de facto* presidential form of government, and demanded a full surrender of the two parties' security apparatuses to the Kurdistan regional government.

The Kurdistan Region's border row with Baghdad, the so-called disputed territories, constitutes another serious hindrance to the adoption of the regional constitution. The Kurds consider the disputed territories theirs, and the Kurdish constitutional draft does not entirely square with the federal constitution, in particular in parts that relate to the disputed territories.

On the other hand, the absence of a written constitution can be convenient, as Kurdish political players are relieved of constitutional responsibilities when they make certain decisions, including initiatives regarding security, foreign policy and

revenue sharing. This circumstance also allows the KRG not to fear sanctions under Article 13 of the federal constitution:

Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void.

No regional constitution means no possible formal breaches of the federal constitution.

Even though the Kurdistan Region has no enacted constitution, the draft constitution reflects the mindset of the Kurdish elites, including their attitude to federalism. Article 7 of the Iraqi Kurdistan constitutional draft unambiguously binds the Kurdistan Region to the federal democratic Iraq:

The people of Iraqi Kurdistan shall have the right to determine their own destiny, and they have chosen, out of their own free will, to make Iraqi Kurdistan as a federal region within Iraq, as long as Iraq abides by the federal, democratic, parliamentary and pluralist system, and remains committed to the human rights of individuals and groups, as stipulated in the Federal Constitution. (Draft Constitution of the Kurdistan Region of Iraq)

There is only one precondition set forth in the draft: Iraq should remain a federal, democratic and parliamentary system.

In the absence of a written constitution, political processes in Kurdistan are governed by statutes and bylaws enacted by the regional legislature, as well as by the internal rules of the major political parties, as in a British-style constitution. The KRG Minister of Foreign Relations, Mustafa Bakir, explained in an interview that the Kurdish Parliament had enacted various statutes that regulate Kurdistan's politics and governance: a statute on the Presidency, a statute on the Parliament, and a statute on the Judiciary.

The Iraqi Kurdistan Parliament was elected in the first regional legislative elections in 1992; it had enacted Law Number 1 in 1992, by which it established its own powers and size—111 seats. Under Article 8 of the Kurdistan Electoral Law, legislative elections must be held once every four years, the most recent elections being held in September 2013. Like at the federal level, the Kurdistan parliament is elected using proportional representation on a closed party-list. Based on election results, all parties are allotted the number of seats in the Parliament proportional to the number of votes cast for the party.

The Kurdistan Regional Government (KRG) enjoys independence and full autonomy in the spheres of its jurisdiction. The KRG's powers are original and not delegated by Baghdad. Unlike governorates, the largest administrative units in Iraq, the Iraqi Kurdistan Region has its own law-making authority that passes legislative acts. The Kurdistan federal region has a *de facto* presidential form of government, as determined by the actual relationship between the presidency and the legislature; unlike at the federal level, the Kurdistan president is elected

directly by the people; while the proposed regional draft constitution suggests a parliamentary system for the Iraqi Kurdistan federal region.

## **Power Sharing and Mechanisms of Mediation**

Federalism, in the words of Daniel Elazar, is not only about “separate rules,” but also about “shared rules” (Elazar 1987: 12, see also Riker 1964: 11). Shared political authority and cooperation between the federal center and regions are crucial for the unity and survival of a federal state. Two parts of the Iraqi federal constitution specify the respective jurisdictions of each level of government and areas where they share powers—Section Four: *Powers of the Federal Government*, and Section Five: *Powers of the Regions*. The exclusive authorities of the federal government are stated in one article, Article 110, and they are:

- Formulating foreign policy and diplomatic representation, negotiating, signing and ratifying international treaties and agreements
- Formulating and executing national security policy, including establishing and managing armed forces
- Fiscal and customs policy, currency and monetary policy, regulating of commercial policy across regions
- Regulating issues of citizenship

The management of oil and gas is also specified in Section Four: *Powers of the Federal Government*, but not as its exclusive powers. The wording of some provisions is imprecise and ambiguous. Thus, Article 111 reads: “Oil and gas are owned by all the people of Iraq in all regions and governorates.” Article 112 requires both the central government and producing governorates and regions to establish a joint management of oil and gas extracted from present fields, while both levels of government are also expected to “formulate the necessary strategy that achieves the highest benefit to the Iraqi people ...”

As a result of the vague wording of these constitutional provisions, Erbil and Baghdad significantly disagree over which level of government can sign contracts with oil companies, for example, and how the revenues shall be ultimately used. On August 6, 2007, the Kurdistan National Assembly (the Region’s parliament) approved the Kurdistan Oil and Gas Law signed into force by President Barzani two days later. At the same time, the federal Hydrocarbon Law has never been passed mostly because of the Kurdistan Region’s opposition. Some 50 oil and gas companies have been operating in the Kurdistan Region. KRG-published statistics show that under the terms of the production-sharing contract with the KRG, “the payback is more lucrative in Kurdistan than in Iraq ...” (Erbil Governorate Website, <http://www.hawlergov.org/en/article.php?id=1361783458>).

Article 114 that is still within Section Four: *Powers of the Federal Government* spells out other competencies shared by federal and regional authorities, like

managing customs, running power plants and electric energy distribution, environment policy, public health and education, and regulation of internal water resources. The constitution also proclaims in Article 115 that “all powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates ...”

As this book focuses on the Kurdistan Region’s security arrangements, diplomacy, and oil and gas revenue sharing, it would be helpful to briefly review the relevant constitutional provisions. Article 121 within Section Five: *Powers of the Regions* contains several paragraphs. Paragraph 5th [on regional security arrangements]:

The regional government shall be responsible for all the administrative requirement of the region, particularly the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region.

Paragraph 4th [on regions’ representations abroad]:

Offices for the regions and governorates shall be established in embassies and diplomatic missions, in order to follow cultural, social, and developmental affairs.

Paragraph 3rd [on revenue sharing]:

Regions and governorates shall be allocated an equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and percentage of their population.

In abstract federal constitutional provisions look rather well-articulated and cogent, but, as we will see in our empirical chapters, the reality brings more complexity.

The constitution endows formal institutions, like the Federation Council and the Federal Supreme Court, with strong powers that allow mediation of the federal relationship. It also mandates the establishment of several independent commissions, including a commission to guarantee “the rights of the regions ... to ensure fair participation in managing ... various federal institutions, missions, fellowships, delegations and regional and international conferences.” The commission shall include representatives of the regions and federal government (Article 105). The draft constitution of the Kurdistan Region also requires that the KRG president coordinate the relations “between regional and federal authorities” (Rafaat 2012: 198).

There are also informal means that would normally allow for fine-tuning and improvement of the federal relationship, like an impressive Kurdish representation in the federal government, including a striking presence in the federal cabinet where ethnic Kurds hold important positions. The Iraqi presidency is assumed by the PUK chairman, Jalal Talabani; the federal Minister of Foreign Affairs is

Mr Hoshyar Zebari, the former envoy of the KDP to the USA and UK. One of the highest ranked Iraqi army generals, Babaker Shawkat Zebari, is an ethnic Kurd and he is the Chief of Staff of Iraqi Joint Forces. Evidently, the president in a parliamentary system is considered a rather symbolic figure, but the Iraqi constitution gives the Presidency significant levers of power; Article 61 allows the President to initiate a vote of no confidence in the Prime Minister, for example.

## **The Electoral System and Political Parties**

The constitution and subsequent electoral laws in Iraq have introduced a proportional representation system in order to better accommodate the ethnic, religious and sectarian diversity of the country. Since 2003, three national legislative elections have been held in Iraq. Every time, the elections were conducted under a new electoral law. “The first electoral law Number 96 of 2004 was issued by the American dominated Provisional Collation Authority in Iraq, which was supported and influenced by the UN proposition” (Hanish 2011: 126). It governed the January 2005 elections; while the second electoral law Number 16, adopted by the newly formed Council of Representatives, governed the December 2005 national legislative elections.

The current Iraqi electoral law, Law Number 20, was adopted by the federal parliament in 2009. The law increased the size of the Council of Representatives from 275 to 325 members, to meet the constitutional requirement that mandates the proportion of one MP per 100,000 citizens. This new law has significantly affected the representation of small political parties in the 2010 national elections, as it did not allow the consolidation of their results obtained in individual districts onto a national list. The current electoral law divides Iraq into 18 electoral districts that correspond to the administrative division of the country in governorates. This seem to be contrary to the constitutional requirement of having one national district that was used prior to that law; Article 49 of the Constitution reads, “The Council of Representatives shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons *representing the entire Iraqi people*” (Emphasis added—AD). As a result, the electoral law in effect now prevents smaller parties or political groupings from entering the parliament. “Under the current electoral law, the possibility of getting the threshold to gain a seat in one of the 18 provinces is tough ... This type of distribution of votes does not guarantee fairness or nurture of an emerging democracy” (Hanish 2011: 128). Hanish notes that because of that, many smaller political parties in the country marked by sectarianism, nationalism and tribalism could not make it to the national parliament (Hanish 2011: 128).

Western analysts often tend to simplify the political situation in Iraq by claiming that Iraq’s public domain in general and politics in particular are affected exclusively by ethno-sectarian identities and resulting tensions and divides. Indeed, the current parliamentary majority is made of Shi'a-influenced parties,

which reflects the sectarian makeup of the country where Shi'a are the majority. However, many political parties in Iraq do not necessarily show unfailing allegiance to sects or ethnic groups. Even though the Shi'a majority in the country is very likely to translate into continuing Shi'a dominance in the parliament, Shi'a electoral blocks are unstable and ever-shifting. Therefore, Prime Minister al-Maliki cannot remain overly confident that he will have continuous support from his fellow Shi'a. This simplification helps to present things using Western stereotypes, but is not always helpful for an adequate understanding of Iraq's realities. The Shi'a majority is not monolithic. There are several Shi'a blocks and parties represented in the parliament, but they compete among themselves. There are other dimensions of identity formation in Iraq. Some Shi'a influenced parties show allegiance to tribes, territories or towns. Even Kurdish parties failed to form one electoral block during the 2010 national legislative elections. A 43-member strong Kurdish Coalition does not represent the whole Kurdistan region in the Iraqi parliament. There are Kurdish representatives from other influential political parties that did not join the Kurdish Coalition, like Gorran, which garnered eight seats in the national parliament, the Kurdish Islamic Union, which has four seats, and the Islamic Group for Kurdistan with two seats.

Political recruitment and competition for power in Iraq is carried out through a multi-party system. Over 20 influential political groups and dozens of small political organizations compete for power at the federal level. Two political parties have been banned from this competition, one for its radical political stance, the other for its past crimes: Hisb ut-Tahrir, an international Islamic Sunni political organization whose goal is to create an Islamic caliphate, and the Arab Socialist Ba'ath Party, the political organization of Saddam Hussein.

During national legislative elections, major political parties form blocks that have proved to be quite loose and constantly shifting from one election to another. During the 2010 elections the National Iraqi Alliance grouped predominantly Shi'a political forces from the Supreme Islamic Iraqi Council and Sadr Movement to the Islamic Dawa Party and won 70 seats; the State of Law Coalition, another Shi'a influenced grouping, garnered 89 seats in the current parliament. The Iraqi List, another block whose driving force is the Iraqi National Accord, better known as Iraqiya, was led during the 2010 elections by former Prime Minister Allawi and secured 91 seats.

The Kurdistan Region's political grouping at the Iraqi national level is formed by the Democratic Patriotic Alliance of Kurdistan, more often referred to as the Kurdish Alliance. It comprises the following Kurdish political parties: the Kurdistan Democratic Party, led by Massoud Barzani; and the Patriotic Union of Kurdistan, led by Jalal Talabani; it garnered 43 seats in the national parliament, a number that would have been more impressive (59 seats) if all Kurdish political forces had been united at the national level. The Iraqi Accord Front (*al-Tawafiq*), which is mostly Sunni, holds six seats in the parliament.

## **Ethnic/Religious Identities vs. Iraqi National Identity**

National sentiments in Iraq and its unified identity are rather weak, given the vivid memories of recent conflicts between Arabs and Kurds and between Sunni and Shi'a Arabs. These antagonisms have made it all but impossible for a sense of an all-Iraqi identity that all people in the country could eagerly espouse. Therefore, the constitutionally proclaimed possibility of a further federalization of Iraq along the ethno-sectarian fault-lines was meant to sooth identity conflicts.

Ethno-sectarian differences in Islamic countries in general and Iraq in particular are typically perceived in the West as the only factors determining politic life in this country (Ismail 2011: 17). "Iraqi realities are however far more complex than this," observes Visser (2008: 2). "To many Iraqis, the ethno-religious community is but one of several possible foci of identity" (*Ibid.*). Iraqis feel a stronger allegiance to other identities than it is perceived by outsiders. "A closer look at the politics of Iraq since 2003 reveals the fascinating pervasiveness of regional identities in Iraq" (Visser 2008: 2). Those who think that Iraq can be further federalized along the sectarian lines may be mistaken. Strong regional identities do not coincide with the sectarian division. Even for the Kurds, their regional identities quite often overshadow ethnic unity and solidarity. Internal regional tensions within Iraqi Kurdistan stand as proof of the existence of strong regional identities that may weaken any sense of Kurdish ethnic unity. The eastern and western parts of Iraqi Kurdistan are still divided and constitute a serious obstacle to otherwise growing pan-Kurdish feelings. The bitter interethnic conflict of the two main political parties is a reflection of a strong regional-tribal identity that can overshadow the ethnic identity of Iraqi Kurds.

On the other hand, much of the Kurdish national character has been shaped by Islam. The Kurdistan incorporation into Iraq since early in the twentieth century had been presented as Islamic unification, favoring a religious community over ethnic identity. The relationship between Islam and Kurdishness has been, however, rather complex. Aram Rafaat (2012) compiled impressive evidence in support of his argument that Islam in Kurdistan is different from mainstream Islam, including its Sunni branch to which Kurds belong.

The Kurdish politicians and leaders who stake on their hope on the Kurdish sense of ethnic belonging consider Islam an obstacle to the fostering of distinct Kurdish identity. In their logic, diminishing religiosity would strengthen Kurdish national feelings. Some already claim that religiosity in Kurds is weak, and "the Kurdish vision of religion is more similar to that of Europeans than that of Arabs" (Rafaat 2012: 23). This particular relationship of the Kurds and Islam may be explained, according to Rafaat, by history and geography. The Kurdish-specific network of socialization in Islam, called Hajra, was in the past isolated from mainstream Islam due to the mountainous areas the Kurds traditionally inhabited. For several centuries, Kurds lived in between the Ottoman and Persian empires, enjoying significant autonomy from both. As a result, the Kurdish principalities were more secular than their neighbors. Some call Kurdish Islam an "un-Islamic

form of Islam” (Acker 2004). Today this particular feature of the Kurdish identity manifests itself in the KRG’s distant position with regard to sectarian tensions in the rest of Iraq, and in the absence of influential Islamic political parties in the region. KRG officials periodically meet with Kurdish religious leaders to urge clerics and mullahs to “remain tolerant in face of new social changes in Kurdistan (Kurdish Globe, March 3, 2012). Significantly, the KRG constitutional draft, while restating some features of the Iraqi political system, reads that Iraqi Kurdistan is a federal region of Iraq and is “a democratic republic with a parliamentary political system,” but does not mention that it is Islamic, as the federal constitution states.

It will be rather difficult for all Iraqis to foster a common unifying identity that all will eagerly associate themselves with. But there is hope—all ethno-sectarian and regional communities in Iraq were able to come together to celebrate the triumph of the Iraqi football team when it won the Asian championship 2007 by defeating the Saudi team.

## **Protecting Other Minorities**

Article 4, the language article, establishes two official languages for the country—Arabic and Kurdish—but it also grants the “right to Iraqis to educate their children in their mother tongue, such as Turkmen, Syriac and Armenian … or in any other language in private educational institutions.” The constitution allows federal regions and governorates to adopt yet other languages as local official languages if the majority of its population decides in a general referendum to do so.

To promote women’s participation in politics and thereby raise their role and status in society, the federal constitution in Article 49 sets forth a gender quota in the national legislature at 25 percent for women, while the Kurdistan Region’s similar quota is set even higher by Law Number 1 and its ensuing amendments at 30 percent (Salih 2009). Currently, there are 39 women MPs in the Kurdistan parliament, which is two seats more than the requirement of the gender quota. Eleven seats in the regional parliament have been reserved for the Assyrian, Armenian, and Turkmen minorities living within Iraqi Kurdistan, regardless of the electoral performance of their political parties.

## **Summing Up**

Having filled the reader in on the main aspects of Iraq’s federal system, the stage has been set to confront its most salient features and concentrate on the paradox of federalism as it may play out in the Iraqi federal context.

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# Chapter 3

## Federalism and Regional Security

### Arrangements: *Peshmarga*, the Kurdish Army

#### **Regional Security Forces and the Paradox of Federalism**

On November 11, 2012, the Erbil-based newspaper *Rudaw* reported a serious incident under the headline *Iraqi Troops and Peshmarga Forces On Verge of Confrontation South of Kirkuk*:

In response to the deployment of large numbers of Iraqi troops in Kirkuk, Kurdish military officials have dispatched thousands of *Peshmarga* forces to the province.

If the federal military employs deadly force against regional security troops, the Iraqi federal experiment may be over. As cooperation between the *Peshmarga* and the Iraqi Defense Ministry is virtually nonexistent, a situation like this can quickly escalate to an all-out war between the Iraqi federal center and the Kurdistan federal region.

The reference to this incident is intended to preface the main question of this chapter as it relates with the other chapters in this volume—namely to the paradox of federalism. How does the existence of armed forces in an ethnic federal unit fit into federal design, and how can regional security arrangements affect the federal relationship?

The possession of independent security forces by the Kurdistan Regional Government may appear contrary to Article 9 of the federal constitution, if interpreted literally: “The formation of military militias outside the framework of the armed forces is prohibited.” On the other hand, it may be perfectly constitutional if the *Peshmarga* is viewed not as an ethnic militia, but as regional security forces, or “guards of the region,” in accordance with Article 121:

The regional government shall be responsible for all the administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region such as police, *security forces*, and *guards of the region* (Emphasis added—A.D.).

In reality, the Iraqi Kurdistan federal region has well-equipped and well trained armed forces that would normally exceed what is envisioned by the constitution. What is more, there is little cooperation, if any, between the federal ministry of defense and the KRG. Anyone with a cursory knowledge of the principles of federalism would agree that powerful, regional, ethnic armed forces do not fit well into federal design. All of this seems to point in the direction in which the paradox of federalism is likely to develop in the Iraqi ethno-federation. The introduction of federalism in Iraq was meant to preserve the country's unity by allowing the Kurds in Northern Iraq to develop their own institutions, government and autonomy. These very institutions, in particular the army, can be ultimately used against the original intent and break up the federation. Despite this apparent contradiction, however, we find exceptional mitigating circumstances with regard to security arrangements in the Iraqi case, which allows us to look at its federalism with some optimism.

In Erbil, Duhok and Sulaimaniya, there are cranes everywhere as new buildings are being constructed. This economic and investment boom is allowed by the markedly different security situations in the three Kurdistan's governorates as opposed to the rest of the country. A significant part of the Region's economic and political success can be explained by a secure and stable environment for investment, achieved through the enormous efforts the KRG has deployed to strengthen its security apparatus.

In contrast to the rest of Iraq, where a regular cycle of bombings does not seem to subside, the last terrorist attack in Kurdistan's capital city of Erbil was in 2007<sup>1</sup>. The differing level of threat is acknowledged, for example, in the travel advice of the UK Foreign and Commonwealth Office. A further point to note by way of introduction is that any visitor to or resident of Erbil, the regional capital, can witness the ubiquitous presence of the *Peshmarga*, the Kurdish armed militia<sup>2</sup>. As a resident of Erbil, one is required to obtain a residence permit, which may involve an interview with the *Asayish*, the Kurdish secret security service.

The problem addressed in this chapter relates to the security arrangements of federal regions, or how the presence of regional armed forces, such as guards, militia,

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1 A recent blast downtown Erbil (September 29, 2013) cannot be considered a terrorist attack, as it was not aimed at civilians, had no political agenda and was carried out by a small armed group in an attempt to set free their comrades jailed in a maximum security prison within the Kurdish secrete services complex. All perpetrators were killed or apprehended.

2 The term "armed militia" within the context of Iraq has negative connotations, invoking sectarian armed groups that have been made illegal under the 2005 Iraqi Constitution, so "armed or defense forces" will be used instead. However, the word "militia" is patterned after the English militia system; militias were common throughout the North American colonies and played a central role in the fight for independence. They also assured the security of new states as the nation expanded westward. Because of this role in the birth and expansion of the American nation, the right of the states to raise, maintain, and employ their own military forces (known since 1824 as the "National Guard") is guaranteed by the US Constitution and the constitutions and statutes of the several states (Lowenberg 2012).

and even local police, may affect the federal relationship in ethno-federations. No federal country comes to mind where regions, provinces, or states possess independent regional troops strong enough to stand up to the national army. In fact, the very idea of federalism has been specifically set forth to avoid such scenarios.

The literature on regional armed forces and other security arrangements within ethnic federations is scant, and its prevailing assumption can be summarized by Brancati's contention that "allowing each region to have its military force would make secession and ethnic conflict all the more likely" (Brancati 2004: 14). In other words, the federalization of the military is believed to be contrary to federal design. The US experience in this respect can hardly be helpful for at least two reasons: (1) the United States is not an ethno-federation; (2) regional/state armed forces and national guards are not independent from the federal government, but are funded by it and can be used by it. The role of state guards in the United States of America is quite singular. It is a unique state-based military force that is shared by the states and the federal center. It is also largely funded by the federal government and trained in accordance with federal standards (Lowenberg 2012). State guards are a ready and reliable force accessible to the states for both state and combined state and federal purposes, as well as to the federal government for federal purposes (Lowenberg 2012). Article 1, Section 8 of the US Constitution (the Militia Clause) similarly authorizes the use of the National Guard to both continuing state control and to the service of the federal government, in order to "execute the laws of the Union, suppress insurrections and repel invasions" (Lowenberg 2012). In sum, the experience of the United States, as one of the world's most successful federations, with its federal units seemingly having armed forces, cannot be used to justify the existence of the *Peshmarga*.

The literature on security issues in the context of federalism is mostly concerned with the restrictions and limitations national governments have on the use of federal forces in regions. The idea of ethnic federal units having independent armies is not even considered, so contrary it is to the very aim of federalism. No successful federations have constituent units endowed with security forces independent from the federal center. Any militia or armed groups formed on an ethnic or sectarian basis raise significant risks of disrupting the federal relationship (Brancati 2009).

Two ethnic federal units within the USSR, Azerbaijan and Armenia, went to war as soon as they acquired their own armed forces independent of Moscow, then the federal center. In Nigeria, after the civil war of 1970–1972, the federal government assumed emergency powers in order to subdue regional military formations, which ultimately allowed the government to take over the security functions of sub-national governments. These measures proved effective and were not reversed after the war (Elaigwu 2006: 211). In other words, the possession of armed forces by federated units in ethnic federations may be a clear indication of which way the paradox of federalism will play out, as it would make secession significantly more likely.

## Our Argument

Despite the theory-based and prevalent view that the existence of the *Peshmarga* exposes Iraqi Kurdistan's underlying desire to secede, I argue that the *Peshmarga* does not necessarily threaten Iraqi federalism in the long run. The logic behind this argument is simple. The existence of an ethnically-based defense force may indeed look like irrefutable proof that the Kurdistan Region is bound to break away. However, we may not be so categorical if we look at the *Peshmarga* as a product of decades of Kurdish resistance to the government in Baghdad, which sought to deny Kurdish identity and assimilate Kurds within a unitary state. Today the situation is totally different. The Iraqi federation offers the Kurds a golden opportunity for fostering their identity and culture. The regional government sincerely considers a partial transfer of the *Peshmarga* under the Iraqi Army's control, because it accepts federalism and seeks no confrontation; most importantly because it needs federal funding for the *Peshmarga*'s operation.

## The *Peshmarga* in Historical Context

If we were to conduct a cross-sectional study of Iraqi federalism and the role of the Kurdish *Peshmarga* therein, we would inevitably come to the conclusion that the presence of an independent, ethnic, regional armed force poses a real threat to federalism, as it clearly points to Kurdistan's secessionist intentions. We stress, however, that Iraqi federalism has been in the making and therefore a longitudinal perspective, a study of events over an extended period of time, is in order to better understand the unique position the *Peshmarga* occupies in the new federal region, and the role they play within the nascent Iraqi federation. A brief digression on recent history can provide a needed and insightful context for explanation.

The word *Peshmarga* has been in existence in its contemporary meaning since the collapse of the Ottoman Empire. Originally it was taken to mean "all armed Kurds fighting for their rights." Throughout history, the main enemies of the *Peshmarga* were the British and the Turks. Only recently, in the 1960s, the *Peshmarga* turned their arms against the Iraqi military. That period in Iraqi Kurdistan's history is sometimes referred to as the First Kurdish-Iraqi War (O'Ballance 1973). As a result of this uprising, the Kurds were promised certain administrative autonomy within the Iraqi state. However, in the early 1970s, the government in Baghdad reneged on its promise in an attempt to strengthen the unity of the country through a campaign of *Arabization*. Particular efforts were made in the oil-rich areas in the North (Meiselas 2008). During this period, the Saddam government established the Kirkuk administrative region, outside Kurdistan even though its inhabitants were predominantly Kurdish. Therefore, Kurds were unwilling to implement the earlier agreements with the Saddam regime over a limited administrative autonomy. A more radical and particularly intransigent faction within the Kurdish liberation movement led by the Kurdistan Democratic Party did not want to make

any further deal with Baghdad. This dissenting bloc soon turned into a new party, the Patriotic Union of Kurdistan (PUK) that, like the KDP, had its own military arm also called *Peshmarga*.

The new party's uncompromising position towards the government in Baghdad led to armed confrontations with Iraqi troops that caused serious casualties on both sides. The Baathist regime in Baghdad could not, however, defeat the *Peshmarga*, as they received massive support from Iran. But later, in 1975, the Iranian Shah struck a deal with Saddam Hussein and withdrew its backing of the Kurds. Soon after, the Iraqi military crushed the *Peshmarga* (Joint Intelligence Analysis 2004). This period is sometimes referred to as the Second Kurdish-Iraqi War, which was characterized by the development of a harsh rivalry within the Kurdish liberation movement between the Kurdistan Democratic Party and the Patriotic Union of Kurdistan that never fully subsided for decades to come. The main task of each was to ensure party control over a particular geographic area and to protect it against the other party's attempts to encroach on to its territory, as well as to fight against the Iraqi Army. Michael Gunter aptly describes the situation as follows: "Divided by philosophy, geography, dialect, and ambition, Barzani's KDP and Talibani's PUK have altered between cooperation and bloody conflict ever since" (Gunter 2011: 13).

When the Iran–Iraq war broke out in 1980, the Kurds allied with the Iranians and helped them to achieve significant success in the beginning of the war in the territories controlled by the Kurds. At this particular time, Saddam's regime made a decision to use a chemical weapon against the Kurds and the Iranians troops. The Saddam army defeated the *Peshmarga* and regained control over Northern Iraq, marking a period when the Kurds were rather unsuccessful in their fight.

During the First Persian Gulf War in 1991, the Iraqi Army was crushed and a no-fly zone was established over the northern part of Iraq. The Saddam regime had no option but to let the Kurds run their own affairs in the region covered by the no-fly zone. This period is often referred to as the 1991 Uprisings. During this period, the first regional elections were held, Kurdistan's government formed, and attempts were made to unify the *Peshmarga*'s two slivers that constituted the military arms of the two major parties, the KDP and the PUK.

The creation of a self-governed autonomous region in defiance of the Saddam regime, which was under international economic sanctions, put the Kurdistan region under double sanctions: one from the international community and the other from the Iraqi regime. The main source of revenue in the region was oil that could be sold only by smuggling into Turkey and Iran. The scarcity of these proceeds caused more tensions between the KDP and the PUK that ultimately degenerated into a full-blown civil war fueled by the desire to control oil trafficking (Devigne 2011). This bloody fratricidal conflict between the two Kurdish parties opened the most shameful page in Kurdistan's liberation movement and history in general. The *Peshmarga* of each party fought each other using mostly mountain guerrilla-type tactics, but also impressive military means ranging from surface-to-surface Grad missiles with conventional payloads to napalm (Bengio 2012: 255–6). At some

points in time during the Kurdish civil war, the KDP asked Saddam Hussein, the Kurdish archenemy who had ordered the use of chemical weapons against Kurdish civilians, to assist it in its fratricidal conflict with their PUK Kurdish brethren. Based on this tragic episode in Kurdish history, some observers now make far-reaching pessimistic conclusions: “The *Peshmarga*’s patrimonial history and organization indicates that northern Iraq’s current stability is not sustainable” (Devigne 2011: 48).

In 1998, the USA brokered an accord between the two warring parties, called the Washington Agreement. It put an end to the protracted fighting of the two slivers of the *Peshmarga*. According to the Agreement, the two parties were to reinstate the joint government in the Iraqi Kurdistan that had been formed based on the 1992 elections. They also agreed to submit all revenues to the unified administration, to hold new regional elections, and to criminalize terrorism, including the PKK. Although the KDP and PUK signed the Agreement in Washington, they remained rather wary about its full implementation at home. They had some doubts about how secure they were from Baghdad, not having any guarantee that Saddam’s regime would not return to the region. Therefore, unsure of the final outcome of the agreement, the partners acted half-heartedly. The real change in their attitude and behavior occurred a few years later, after a secret meeting with US President George Bush in April 2002. It is hard to say what exactly was discussed, but the meeting “prompted the KDP and the PUK to bury their differences and start closing ranks … and the Kurds accomplished what they had not managed to do in years” (Bengio 2012: 266). An additional impetus to closing ranks and putting aside their differences was provided by the emergence of Islamic terrorist groups in the region, perceived as instigated and supported by the Saddam regime.

During the Second Persian Gulf War, the *Peshmarga* fought the Iraqi Republican Guard alongside the Coalition forces. It collaborated in particular with the CIA’s Special Activities Division and the US Military’s 10th Special Force Group, first to fight Islamic terrorist groups operating in the region and supported by Saddam, then to fight the Iraqi Republican Guard (Woodward 2004). Encouraged and emboldened by their powerful allies, the *Peshmarga* liberated three Kurdish provinces in the north of Iraq, Erbil, Duhok and Sulaimaniya, as well as adjacent areas inhabited predominantly by ethnic Kurds. However, later on, the allies asked the *Peshmarga* to withdraw from these territories, including the Kirkuk administrative region. Mohammed Ahmed, in his book *Iraqi Kurds and Nation-Building*, gives his explanation of why that happened: “Neither the United States, nor Turkey, nor Baghdad [after Saddam] wanted the Kurds to control the oil-rich Kirkuk province, fearing that might provide the Kurds with sufficient resource and landmass to declare independence” (Ahmed 2012: 8).

The US government that sponsored constitution-making and advocated federalism specifically to accommodate the Kurds in Iraq is often blamed for “coddling the Kurds” (Natalie 2012), including allowing them to have their army. However, all the USA officially promised to the Kurds is an autonomous region, not

an independent state. American leaders, despite frequent accusations of favoring the Kurds, have been adamantly opposed to any further privileges and refused to support any Kurdish claim unconditionally. President Bush stood unyielding in favor of a unified Iraqi federation. Secretary of State Colin Powell clearly said, “... It is absolutely clear that part of Iraq must remain part of Iraq” (Pan 2004). The US position on the *Peshmarga*, however, has not been entirely clear, nor are the relevant provisions of the Iraqi constitution. In contrast to other armed militias in Iraq, that were disbanded and prohibited by the Coalition Provisional Authority, the *Peshmarga* were allowed to operate and even made their way into implicit constitutional approval, although the word *Peshmarga* is not mentioned in the constitution. It is fair to say that the relevant constitutional provisions are somewhat ambiguous and lend to various interpretations.

The KRG’s military forces were used outside its own territory during the coalition invasion in 2003, when the PUK *Peshmarga* took Kirkuk and the KDP *Peshmarga* took Mosul. Later the Kurdish forces were withdrawn; however, the KRG keeps the *Peshmarga* and other security units, like *Asayish*, in the vicinity of Kirkuk. One of the current sources of tension and disagreements between the KRG and the federal center is exactly the deployment of the *Peshmarga* outside the Kurdistan Region, something that the KRG denies. Shvan Kuvli, a MP and a member of the Security Committee of the Kurdistan Parliament, clearly stated that *Peshmarga* troops are not currently deployed beyond the Kurdish federal region. His statement should be taken to mean that Kirkuk is not considered “beyond,” as indeed it is a disputed territory.

## Current Security Challenges in Iraqi Kurdistan

Whilst the rest of Iraq has been blighted by regular acts of terrorism, the Kurdistan Region through its security mechanisms has been generally successful in keeping the perpetration of terrorist acts to a low level. That said, various terrorist groups have sought to commit acts of terrorism in the Kurdistan Region, some of which they have achieved. The terrorist groups that threaten the Kurdistan Region are both of Kurdish origin and from Al-Qaida cells in Iraq. David Romano (2007) provides useful details on the origins of the Kurdish Islamist Groups in Iraq.

A few months [December 2001] after Jund al-Islam’s creation, a fourth group of radical Islamists joined the organization—Mullah Krekar’s Reformist Group, yet another splinter from the IMK/Islamic Federation of Kurdistan. Mullah Krekar (whose real name is Najm al-Din Faraj Ahmad) lived in Pakistan in the 1980s and studied Islamic jurisprudence under Abdullah al-Zam (Osama bin Laden’s mentor). Jund al-Islam took on Mullah Krekar as its spiritual leader and adopted the new name of Ansar al-Islam.

The last to date<sup>3</sup> incident of terrorism in the Kurdistan Region was the 2007 attack in Erbil. A truck loaded with explosives killed 19 people and wounded 70 in front of the interior ministry building. There were civilian, women and children among the casualties. Ansar al-Islam, the above mentioned terrorist group, claimed responsibility for the blast (Kurd Net, Sept 30, 2010). The current security situation is quite different, thanks to the KRG's painstaking efforts deployed to this effect. The Kurdistan regional government and the Kurdish elites in general have come to the realization that an essential precondition to political and economic success and the further development of Iraqi Kurdistan is solid security. Since 2007, the KRG has managed to seal the region from the rest of Iraq through an elaborate network of checkpoints manned by the *Peshmarga*. This has been noticed not only in the Region, but also by the international media. The *Guardian* in 2010 praised the security situation in northern Iraq and commended the KRG's efforts to prevent terrorist elements from infiltration into the Kurdistan Region.

Current security threats come from elsewhere. The neighboring countries Turkey and Iran, with their large Kurdish populations, pose more serious threats to security in Iraqi Kurdistan and have displayed open hostility to the establishment and development of the Kurdish autonomy. For the last several years, mountainous border areas of Iraqi Kurdistan have come under intense aerial bombardments, first by Iranian troops, and then by Turkish war planes joining the assault. Particularly harsh were the bombardments in summer 2011, when the attacks caused many civilian deaths. Observers believe that Iran uses the Free Life Party of Kurdistan (PJAK) and Turkey uses the Turkey Kurdish Workers' Party (PKK) as a pretext for their attacks, while the real intent is to exert pressure both on the Kurdistan Region's and Iraq's federal government. Some analysts note the perfect timing of the 2011 attacks—the US troop withdrawal and the revolution in Syria, another country with a substantial Kurdish population. By these aerial raids and bombardments, both Iran and Turkey seem to be sending a message to all Kurds: the Kurdish national question, one of the most complex issues in the Middle East, will not be solved the way the Kurds would wish, or even the way it has been solved in Iraq through the establishment of federalism.

There is no doubt neither Turkey nor Iran bombs the region just to chase PKK or its affiliated organizations' guerrillas. This is for public appetite. It is simply so because neither PJAK nor PKK pose a serious threat to the security of those

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3 A recent blast downtown Erbil, September 29, 2013, cannot be considered a full-blown terrorist act, but was an obvious security breach. A small group of an Al-Qaeda affiliated organization (Islamic State of Iraq and the Levant (ISIL), rammed a checkpoint outside the headquarters of the KRG Ministry of Interior and Asayish; the compound also houses a high security prison. As a result, 7 security guards killed, several wounded, all assailant destroyed or apprehended. This terrorist organization took active part in the Syrian civil war, but was disbanded by Al-Qaeda leader Ayman al-Zawahiri's a written order issued in June 2013 after its massive defeat from Kurdish YPG forces in Syria.

countries. For Turkey and Iran, the real danger is the existence of the Kurdish national question and its potential threats and capacity to disrupt both countries' political establishment and integrity. (Azad Aslan *The Kurdish Globe* No. 319, Saturday, August 27, 2011)

Most of the people within Iraqi Kurdistan think that the success of the Kurdish federal region, measured by its rather high political status domestically and internationally, as well as its impressive economic growth shows that the Kurdish national question can be solved effectively:

[The] Kurdistan Regional Government proved they can run their own affairs and their own government better than those who so far mismanaged Kurdistan, whether is Turkey or Iran or Syria. The existence of the KRG and all other political and civil organizations in Kurdistan Region of Iraq sets a kind of road map for the rest of Kurdistans. It is this road map that brings chills to Iran, Turkey and Syria. (Azad Aslan *The Kurdish Globe* No. 319, Saturday, August 27, 2011)

Frequent bombardments of border areas poses a continuous threat to the Kurdistan Region, not so much in terms of military invasion and material losses, although civilian deaths are considerable enough, but because of their underlying interest to exert pressure on the KRG. The KRG president's statement expresses this point well:

Dear People of Kurdistan,

As you are aware, the situation in the Kurdistan Region's border areas has deteriorated, causing our people to face daily Iranian and Turkish bombardment and aerial attacks.

These attacks have inflicted great suffering on our people in the border areas, leaving some dead and injured. They have intensified in recent days to the point that we can no longer remain silent and watch our innocent, vulnerable civilians pay the price of this fight. The presence of armed PJAK and PKK members in the mountainous border areas provides an excuse for our two neighboring countries to commit these attacks ... (*The Kurdish Globe* No. 319, Saturday, August 27, 2011)

Strangely enough, the Iraqi federal government in charge of national defense does not seem seriously alarmed by the constant violations of Iraq's national sovereignty through incursions into its territory by foreign troops. No significant action has been undertaken by the Maliki government to react in any substantial way to these obvious breaches of national sovereignty and international security.

The bombardments and frequent incursions into Iraqi Kurdistan by neighboring countries have been acknowledged by members of the Kurdistan parliamentary security committee as a major security threat to federal Kurdistan. When asked

to rank order threats to the Region, they unanimously gave foreign attacks on Kurdish boarders by foreign troops as threat number 2, while threat number 1 was said to be the dictatorial penchants of Prime Minister al-Maliki that have been translated into an increasingly authoritarian rule in Baghdad, with an ominous possibility of thwarting federalism (Kuvli 2013 and Ali 2013).

### **Uneasy Relations with Baghdad**

Several articles of the Federal Constitution regulate security arrangements at the national and regional levels. Article 110 states:

The federal government shall have exclusive authority in the following matters:

First: Formulating foreign policy and diplomatic representation ...

Second: Formulating and EXECUTING (emphasis added, A.D.) national security policy, indicating establishing and managing armed forces to secure the protection and guarantee the security of Iraq's borders and to defend Iraq.

Unlike foreign policy, where the federal government has the exclusive authority to "formulate" but not necessarily execute policies, national security policy is formulated and executed exclusively by the federal government.

Article 9 (A) requires that the ethno-sectarian composition of the Iraqi armed forces reflect the country's ethnic and sectarian makeup:

The Iraqi armed forces and security services will be composed of the components of the Iraqi people with due consideration given to their balance and representation without discrimination or exclusion.

Article 9 (B) outlaws the creation of armed militia groups outside the national defense structures:

The formation of military militias outside the framework of the armed forces is prohibited.

Article 117 proclaims the following, however: "This Constitution, upon coming in force, shall recognize the region of Kurdistan, along with its existing authorities, as a federal region." Obviously, the phrase "with its existing authorities" can be interpreted as referring to its military and security authorities as well, that

is, the *Peshmarga*. In other words, the *Peshmarga* is to be viewed as a security arrangement well in line with the Iraqi constitution.<sup>4</sup>

Paragraph 8 of Article 121 puts the regional government in charge of “all administrative requirements of the region, particularly the establishment and organization of the internal security forces for the region, such as police, security forces and guards of the region.” Again, if the *Peshmarga* is one of those, it is perfectly constitutional. The KRG Minister of Peshmarga Affairs, Sheikh Jaafar Mustafa, in a statement to the Arab-language newspaper Al-Hayat, explains this constitutional provision further: “The Iraqi Constitution grants each [federal] region the right to form security forces as part of the national defense system. Kurdistan is [so far] the only such region in the country,” said Mustafa (Al-Monitor 2013).

### *The Budget and Funding*

If the *Peshmarga* are regional guards, the American-style armed militia, or what is currently referred to in the USA as National Guard, then why are they not integrated into the national defense forces and are not funded from the national budget? Why is there no collaboration or simple coordination between the Ministry of *Peshmarga* Affairs and the national Ministry of Defense? *Peshmarga* Minister Mustafa accuses Baghdad of not using the federal budget to cover his ministry’s needs. “The federal government in Baghdad should have used this budget since 2007. It has not yet fulfilled its obligations, despite the Iraqi parliament’s approval of this financing (Al-Monitor 2013).

Instead, the *Peshmarga*’s funding is rather scarce and entirely based on what the KRG can afford. The *Peshmarga* receive no military supply of hardware and equipment from Baghdad. Therefore, the KRG is believed to occasionally resort to rather questionable deals in order to equip the *Peshmarga* and maintain their combat readiness. As reported in the media, three C-130 cargo planes loaded with arms landed in the Sulaimaniya international airport in September 2008. They allegedly brought a significant amount of small arms and ammunition imported from an Eastern European country intended for the *Peshmarga*. Washington Post reported on November 24, 2008 that “Kurdish officials declined to answer questions about the shipments but released the following statement:

The Kurdistan Regional Government continues to be on the forefront of the war on terrorism in Iraq. With that continued threat, nothing in the constitution prevents the KRG from obtaining defense materials for its regional defense. (washingtonpost.com)

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<sup>4</sup> By mentioning the Kurdistan Region by its name, the constitution treats preferentially this federal unit within the federation that can potentially be composed of several other federal units, thereby the constitution introduces some asymmetry in the federal relationship.

This incident provoked an outcry in Baghdad and a war of words, causing increased tensions between the KRG and the federal government.

*Peshmarga* Minister Mustafa brushed aside all media reports by saying that the rumors about Kurds being in contact with eastern European countries to arm the *Peshmarga* were a joke. He claimed that there were no attempts to acquire weapons contracts with other countries. “Rumors about providing us with Apache helicopters and tanks are completely baseless.” Mustafa also claims that the central government in Baghdad is well informed about all developments within the *Peshmarga*, including the presence of US advisors in Kurdistan: “A number of expert US trainers are working in Kurdistan with our troops, as part of the [US] troop-withdrawal agreement. This is being done with the full knowledge of Baghdad” (Al-Monitor 2013).

The Iraqi air force laid waste since the 1991 Kuwait War is now in the process of reconstruction. In 2011, Washington agreed to sell 36 F16s to Baghdad for delivery in October 2014. However, there will be at least a two year gap before the Iraqi pilots complete their training in the United States (Zezulwicz 2011), so Iraqi airspace has remained unprotected since the end of the Stationing of Forces Agreement and US troop withdrawal in December 2011. Therefore, the Iraqi military was expected to have 100–150 helicopters by the end of 2012. The acquisition of this modern equipment makes officials in the KRG anxious, fearing that they could be deployed against the Kurds. Therefore President Barzani, during his visit to the United States in April 2012, asked President Obama to delay delivery until Prime Minister al-Maliki would have finished his term in office.

Some critics go as far as to claim that there is an actual arms race between the *Peshmarga* and the Iraqi army. The KRG has recently bought over 20 Apache helicopters from the US while Baghdad has placed an order for F16 fighter planes from the US (Ose 2012). It is common knowledge that some journalistic reports and claims are intentionally sensational, which seems to be true with regard to the use of the term “arms race” to describe the relations between Erbil and Baghdad.

The first serious disagreement in the new Iraq between the national Ministry of Defense and the KRG over the *Peshmarga* emerged in 2008. Baghdad showed its dissatisfaction with what it perceived as an excessive number of *Peshmarga* troops and insisted on their reduction to 30,000. The number of the *Peshmarga* soldiers has never been publicly disclosed. It is estimated that in 2011 there were 190,000 enlisted fighters in Iraqi Kurdistan. Additionally, media reports claim that there are as many as 90,000 retired soldiers who remain on reserve and also on the KRG payroll, receiving pensions. “An agreement has yet to be reached between Erbil and Baghdad on the size of the *Peshmerga* forces” (Al-Monitor 2013). The KRG rationalizes the large number of the regional security forces by invoking the particular character of the mountainous terrain where the *Peshmarga* have to operate. Mustafa, the KRG Minister of *Peshmarga* Affairs, describes the *Peshmarga* as follows:

The *Peshmerga* security troops carry lighter arms than the army, but are more heavily armed than the police force. [The role of the Ministry] is not only limited to maintaining security in Kurdistan, we also aid the federal government in facing the security challenges in other provinces. The *Peshmerga* have been cooperating with the Baghdad-based government in enforcing security and stability beyond the borders of Kurdistan. We have made great sacrifices in Baghdad, Samarra and other cities. (Al-Monitor 2013)

Baghdad not only refuses to fund the *Peshmarga*, but has also asked the KRG to close two military academies in Iraqi Kurdistan. At some point, there was an agreement that several *Peshmarga* units would be incorporated into the Iraqi army. 30,000 troops are planned for transfer to the federal ministry of defense “to form two divisions in the national army.” These divisions would be stationed in Kurdistan. The rest of the troops would serve as guards of the region and security forces, to enforce the rule of law within the region. “The *Peshmerga* troops would also support the armed forces of the Iraqi government to prevent external threats if the region is attacked by neighboring countries” (Al-Monitor 2013).

### Kurdistan’s Imbroglio: Politics and Security

Some accuse the *Peshmarga* of remaining, in fact, party militias; a claim that may find some proof in what happened during the student protests in 2010, when the *Peshmarga* were used against the protesters of the opposition party *Gorran*, the Movement for Change (Ahmed 2012: 22).<sup>5</sup> One of the demands set forth by the protestors was exactly the transformation of partisan *Peshmarga* forces into a national Kurdish security force (Ahmed 2012: 36). Despite serious and earnest attempts to unify Kurdistan’s administration, Erbil and Duhok governorates remain under KDP control while Sulaimaniya is under PUK control, and mistrust between Kurdistan’s two major political parties continues.

Politics in the Kurdistan federal region and the troubled relationship between the two political parties in particular, may have a positive impact on the development of federalism in Iraq, as it eases pressure on the federal government. It took many years after the Kurdish civil war (1994–1998) to come to a formal agreement in 2006 in order to achieve a certain degree of trust between the two parties. One of the important factors that helped the reunification process was domestic politics in Iraq. It pushed the Kurds to create a united front—the Kurdish Alliance—in order to assert themselves within Iraq’s political arena, including the nomination of the PUK chairman, Talibani, as Iraqi President. The successful confirmation of Talibani as Iraq’s president validated the Accord and allowed the two parties to proceed and form the regional cabinet in Erbil, as well as to

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<sup>5</sup> Even American General Tony Cucola, the commander of US Division-North, warned *Peshmarga* leaders to stop using the *Peshmarga* in interparty feuds (Ahmed 2012: 23).

continue efforts to merge the two slivers of the *Peshmarga* (Ahmed 2012: 15). Both Barzani and Talibani, the leaders of the DPK and PUK, hoped that “the reunification of Kurdistan [major political parties] would enable the Kurds to bring back disputed Kurdish areas to the fold ...” (Ahmed 2012: 13). Ahmed points out, however, that the Reunification Accord, which formally united the KDP and the PUK administrations into the KRG did not entirely alleviate deep-rooted distrust. Much of the motivation for the rapprochement was provided by politics on the Iraqi national scale.

As reported in the press, the unity of the two parties was damaged yet again after the 2010 Iraqi national legislative elections, in which the KDP won 32 seats and the PUK only 10 seats. The two parties had agreed in the Reunification Accord that they would share equally between themselves everything they would get to control in the Baghdad government. “The KDP won most of the Kurdish alliance’s seats but was forced to equally split with the PUK the seats reserved for the Kurds in the Iraqi government, in accordance with their strategic agreement” (Zebari 2013). This new source of tensions may explain the two parties’ divergent positions on their relations with Baghdad: the KDP is willing to boycott the al-Maliki cabinet while their PUK partners seem more reluctant to leave the federal government. The absence of a genuinely unified position shared by the two main Kurdish political forces undermines the Kurdish Coalition in Baghdad, yet strengthens Iraqi federalism by diminishing regional pressure on the federal center.

The recent dramatic standoff between the *Peshmarga* and the Iraqi army, the report of which prefaced this chapter, serves as a grim reminder of the serious challenges faced by the federal system in Iraq, coming from the country’s federal security arrangement and the existence of powerful regionally based armed forces. An open confrontation would be the worst-case scenario for the Iraqi federation. This latest incident therefore begs for more analysis.

The KRG dispatched thousands of *Peshmarga* forces to strengthen its existing contingent in the disputed areas, in response to the deployment of a large number of the Iraqi military backed by the Dijla forces<sup>6</sup>.

The immediate dispute centers around the central government’s deployment of tanks to the area around Kirkuk, which the KRG has provisionally claimed as its own. Sankawi<sup>7</sup> said the Peshmerga would not allow the Iraqi military to threaten Kurdish interests in the area.

... KRG officials have been predicting a fight for years, and earlier this month Iraqi Prime Minister Nouri al-Maliki demanded the KRG to transfer the Peshmerga to his personal control. With Maliki also the nation’s Defense

<sup>6</sup> The Dijla (Tigris) Command was formed by Iraqi Prime Minister al-Maliki to “eliminate the remnants of terrorism in Diyala, Kirkuk and Salahaddin provinces” (Press TV, Nov 18, 2012).

<sup>7</sup> Mahmood Sankawi, a senior member of the Patriotic Union of Kurdistan.

Minister, Interior Minister, Public Security Minister, etc., he currently directly runs every single force in Iraq except for the Peshmerga. (Ditz 2012)

Yet another grave incident occurred at the Syrian border in the months of July and August, 2012. “The Peshmarga units and the Iraqi military acted more like armies from opposing nations, than two arms of a national force,” Hoshnag Ose notes in *Kurd Net* on September 2, 2012 in an article titled “Friend or Foe?”:

The tensions arose after July 27, when the Iraqi government ordered Iraqi army brigades to deploy in areas normally under the control of the Iraqi Kurdish troops, known as the *Peshmerga*, on the borders between Iraq and Syria, and more specifically in the Zamar area in the state of Ninawa. The reason: to protect border areas. However the *Peshmerga* did not allow the Iraqi army to complete its mission. This was because Iraqi troops were sent into these areas without, according to the commander of *Peshmerga*, prior arrangement. The areas, around the city of Dohuk and, in particular, in the Zamar area, are part of what are known in Iraq as “disputed territories”—that is, where there is land that Iraqi Kurdistan says belongs to Iraqi Kurdistan but which Baghdad says belongs to Iraq.

As a result, Baghdad continues to insist that the Kurdish army in Iraqi Kurdistan serves only the interests of Iraqi Kurdistan, not the Iraqi nation, therefore it can become unconstitutional.

Prime Minister al-Maliki, after emerging unscathed from a no-confidence vote in June 2012, much due to the unanticipated support lent to him by Jalal Talabani, the Iraqi President and the chairman of the Patriotic Union of Kurdistan, created a military formation called Dijla Force Command. The Dijla Force was formed with the proclaimed aim of “eliminating the remnants of terrorism.” Kurdish officials claim that the Dijla Command is a sectarian (Shi'a) military formation, used as a political tool to delay the long overdue implementation of a constitutional provision (Article 140) requiring that the disputed territory problem be resolved through a referendum in the territories concerned. The dispatch of the Dijla Command to the same area where the *Peshmarga* were deployed increased the risks of conflict and has become the source of much controversy, especially among Kurds who fear that it may be an attempt by the central government to take control of the disputed territories. Kurds also accused the Dijla operation commander, Abdul Amir al-Zaidi, of being a former Baathist who had participated in the Anfal operations.

In defiance of the constitution, which requires that the Iraqi military be formed of representatives of all sects and ethnicities, Kurdistan’s MP Muhamed Ali said in an interview that 90 percent of the Dijla command is composed of Shi'a, which, if true, can be seen as the establishment of a sectarian militia, something explicitly prohibited by Article 9 (B) of the constitution. Furthermore, Shvan Kuvli, another member of the Kurdish parliament, said that Maliki had not sought approval from the Iraqi parliament, required in such cases by the constitution.

Later in 2012, tensions between KRG President Barzani and Iraqi Prime Minister Maliki escalated after the KRG refused to hand over Iraqi fugitive Vice President Tariq al-Hashimi, who had been in Erbil when Baghdad's court issued an arrest warrant for terrorist attempts against officials in the country (KurdPress.com). Although Maliki warned the KRG that the Kurdistan Region would have serious problems if it did not hand Hashemi over, the KRG refused. It explained its position by saying that Hashemi was a guest in the region and Kurdish tradition required that he be treated as such—an interesting logic behind their defiance of the federal judiciary ruling. The crisis was partially resolved when Hashemi left the Kurdistan Region for Qatar. The KRG then announced that since Hashemi was no longer in the region, the problem was no more. Even though the incident blew over as quickly as it arose, the distrust caused by it still remains.

On the other hand, the details of this incident are not as clear and straightforward as they may appear. First, Vice President Hoshemni should have enjoyed immunity from prosecution while in office, and no court should have issued an arrest warrant without securing the lift of his immunity. Second, the warrant was issued when Hashemi was not in Baghdad, but on a visit to the Kurdistan region. If the KRG had handed him over to the Iraqi police, that would have impacted the improving Kurdish-Sunni relationship vis-à-vis the Maliki government, who both accused it of usurping power in Iraq. Third, there may be an international dimension to this conflict; Hashemi strongly opposed the support Iraq was giving to Assad in Syria, as did the KRG.

In light of past violence between the Kurdish and Arab populations in Iraq, it should not be surprising that tensions would remain. The ethnic fault lines, especially over the issue of Iraq's disputed territories, are particularly dangerous in the current political climate. With Kirkuk's status unresolved, the non-implementation of the constitutional provisions regarding the disputed territories, and the dispatch of the two armies there, the risk of a violent confrontation has grown.

The Kurds are cognizant of the historical evidence that when the government in Baghdad has been weak, it has conceded autonomy to the Kurdistan Region, and when it has become strong again it has sought to bring the Region back under tighter control. Therefore, any efforts by Baghdad, including its desire to strengthen the Iraqi army, are also viewed with anguish and misgivings in Erbil. On the other hand, the *Peshmarga* are regarded with a lot of suspicions in Baghdad, particularly for their role or potential in solving the issues of disputed territories.

### **The *Peshmarga* and the Iraqi Army: Friends or Foes?**

In a book chapter titled "*Iraqoncileable Differences: the Political Nature of the Peshmerga*," Jacqueline Devigne (2011), who conducted field research in Kurdistan, provides a thorough analysis of the situation and gives recommendations on how to change the status of the Kurdish security forces and thereby improve the relationship with Baghdad:

The *Peshmerga*'s equipment is not advanced and also suffers from a lack of support from Baghdad. Jafar Mustafa Ali [Minster of Peshmarga Affairs] noted that the *Peshmerga* use former Iraqi equipment, which was often captured in past battles. Once again, if the *Peshmerga* were integrated into the Iraqi defense budget, many of these equipment shortages could be rectified. In addition, once this integration is completed, the *Peshmerga* will also be eligible to receive equipment and training directly from the United States and NATO allies ... Integration into the federal defense budget would unquestionably strengthen the *Peshmerga*'s resources and capabilities.

If the *Peshmerga* were integrated into the federal system, it would undoubtedly become a stronger organization with more resources at its disposal. It would also become more closely linked with the federal government; Kurdistan's success would be Baghdad's successes as well.

No doubt, the integration of the *Peshmarga* into the Iraqi national armed forces, or at least closer collaboration with the national Ministry of Defense, would significantly improve the federal relationship. Unfortunately for Iraqi federalism, such cooperation today is sluggish and episodic. It is quite ironic and rather strange that there is no close collaboration between the KRG and Baghdad in security matters, as one of the most prominent figures in the new Iraqi armed forces is Babaker Shawkat Zebari, an ethnic Kurd who remains the Chief of Staff of Iraqi Joint Forces. After the US-led invasion of Iraq in 2003, the Iraqi army was disbanded by one of the first Coalition Authority orders in May 2003, but later in August it was re-established. While fighting together with the US-led coalition, the *Peshmarga* participated in battles alongside the newly established Iraqi army. When the Arab police and units of the new Iraqi National Guard were defeated by insurgents in Mosul late in 2004, the Kurdish *Peshmarga* troops came to rescue and joined the Iraqi National Guard. Together they counter-attacked and seized the city. *Peshmarga* units were deployed in many places of Iraq, including in the Green Zone to protect Iraqi politicians. Kurds also serve in the new Iraqi army.

Today the Kurdish battalions of the former *Peshmarga* units (Second Division) are placed under the Iraqi Army's command and are stationed near Mosul. *Peshmarga* units are also occasionally sent to Baghdad under the authority of the federal Ministry of Defense. An article in *Rudaw* from December 28, 2010, under the heading “10,000 *Peshmarga* in Baghdad” reports on one of such instances:

SULAIMANI, Iraqi Kurdistan: Ten thousand members of the Kurdish *Peshmarga* forces have been sent to Baghdad to protect Jalal Talabani—the Kurdish president of Iraq—and all other Kurdish officials there ...

The Kurdistan Regional Government (KRG)'s minister for *Peshmarga* affairs, Sheikh Ja'far Mustafa, confirmed to *Rudaw* that there were at least “a few thousand *Peshmarga*” stationed in Baghdad to protect Kurdish leaders.

“[They] are in Baghdad to protect Jalal Talabani and other Kurdish officials and ... are under the authority of the Iraqi Defense Ministry [Emphasis added—AD],” said Mustafa

“Because [they] take orders from the Iraqi military chief and Jalal Talabani, we don’t have anything to do with them,” said Mustafa ...

Once in a while, *Peshmarga* units under the authority of the KRG are sent to other areas outside the region. Masrur Barzani, the Director of intelligence and security in the KRG, admits and justifies the *Peshmarga*’s presence outside Kurdistan’s territory by “necessity,” arguing that “by law we are concerned with Kurdistan’s security but because of the security vacuum in other parts of Iraq we cooperate to maintain security and order all over Iraq” (Rudaw, Dec. 28, 2010).

## **Discussion and Conclusions**

Territorial defense forces in ethno-federal states constitute potentially dangerous security arrangements. Without a doubt, the presence of a powerful armed force in the ethnic federal region of Iraqi Kurdistan, coupled with its recent history of bloody confrontations with national armed forces, is a serious threat to the federal relationship. Considering Iraqi federalism through the prism of the regional security arrangement in Kurdistan, one can come to a logical conclusion that Iraqi federalism looks like a house of cards that will fall apart as soon as there is an open armed confrontation between the local defense forces and the federal army. Indeed, such a clash would likely deal a serious blow to the nascent and fragile federal relations in Iraq.

Having admitted that, we find strong mitigating circumstances to justify the existence of an armed force in the Kurdistan federal region. The *Peshmarga* had been around long before the creation of the Iraqi federation. The current KRG security forces were formed as a result of a merger of the military and security arms of the two political parties that had quite tense relations in recent past. The merger is not full and the parties keep a certain degree of control over their respective troops, since profound mistrust between the two major Kurdish parties still remains. This is to say that the existence of the *Peshmarga* in Kurdistan is a legacy of previous conflicts, not a new development within the recently established Iraqi federal system. The *Peshmarga* as “internal security forces for the regions” received implicit constitutional approval, partially as a result of their contribution to the liberation of Iraq, partially because of the firm position of the KRG during the constitutional debates and constitution preparation.

What helps us to entertain optimism in the delicate matter of Iraq’s security arrangements is the Kurdish leadership’s strong commitment to federalism and the position of the United States. The Kurds do not have a viable alternative to federalism while the USA is, in a sense, a guarantor of the territorial integrity of Iraq. This outside influential force is likely to cool down hot heads both in

Baghdad and Erbil<sup>8</sup>. One of the most important tasks the USA saw in Iraq prior to the troop withdrawal in 2011 was the resolution of the *Peshmarga* controversies and avoidance of its confrontation with the Iraqi army in the disputed territories. During his visit to the Kurdistan Region in December 2012, the US Ambassador to Iraq, Mr Beecroft, confirmed that the United States hopes both sides will rely on dialogue. With regard to the disputed territories, he said that any changes to the *status quo* in the disputed areas should be made through mutual understanding and coordination between the two sides. The *National*, a US-based journal, remarks in this regard that “the Kurds had become less dogmatic and more realistic and that they understand the international *status quo* would force them to reconnect with Baghdad” (Ahmed 2012: 54).

Tentative attempts have been made to transfer the *Peshmarga* under federal control in order to decrease the number of regional troops, to comply with the federal center demand, and to receive federal funding and equipment. The Kurdish embattled draft constitution also states that the Kurdistan’s president will be tasked to coordinate the collaboration between the KRG and the national Ministry of Defense. Among other things, the president would “allow federal armed forces to enter Kurdistan territory when necessary” with approval from the regional parliament after “defining the mission of these forces, as well as the location and the duration of their stay in the Region.”

Much of the ethnic and sectarian tensions in Iraq, as well as inter-tribal conflicts among the Kurds, have been fueled and fanned by politics and unscrupulous struggles for power. The new Iraqi political system, including federalism, provides for orderly and civilized political processes, and the success of state-building and of the federal system will largely depend on how much the political culture can adapt to the new institutions established. The peculiar security relationship between the Kurdistan federal region and the national government is an integral part of this process.

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8 It is fair to note that the Kurds are somewhat misled and confused by the divergence between the official US position and that of many former American officials turned businessmen, in particular those in the oil business. Remarkably staunch American advocates of Kurdish independence and statehood are Peter Galbraith, a former diplomat and advisor to the Kurdistan Region Government and Jay Garner, a retired United States Army lieutenant general and Director of the Office for Reconstruction and Humanitarian Assistance in Iraq after the invasion. See Chapter 5: Federalization of Natural Resources for more details.

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# Chapter 4

## Federalism and Kurdistan Region's Diplomacy

The engagement of sub-national units in international relations alongside sovereign states is not unusual and not necessarily a sign of separatist aspirations. In fact, the phenomenon is increasingly common and widespread in the age of globalization. Growing economic interdependence has made such engagement a necessity. Internationalization of many aspects of life has significantly undermined sovereignty as we know it, and made national borders an unreliable shield to prevent federal regions and other sub-state entities from interaction with the outside world.

Growing economic ties, the mobilization of capital, joint ventures and a myriad of other activities have caused sub-state actors to undertake actions beyond national borders in order to promote their interests, especially when they feel unsatisfied with the national government. Federal regions' activism in the international arena and their independent "foreign policy" are often referred to as *paradiplomacy* and are comparatively well researched (Aldeacoa and Keating 1999). Some scholars distinguish *paradiplomacy* from *protodiplomacy*, the latter being a type of foreign policy adopted by sub-national governments whose diplomatic efforts are aimed at gaining independence and complete state sovereignty (Balthazar 1999: 162). This distinction can prove quite useful in examining the paradox of federalism in Iraq.

In some cases, *paradiplomacy* seems to have the underlying causes other than simply globalization; *paradiplomacy* also serves to accommodate for cultural, linguistic and overall ethnic distinctiveness and aspirations and is being widely used by nationalizing elites. The cases of Quebec in Canada and the regions and communities in Belgium come to mind in this respect, as well as Switzerland and Brazil. Some federal units in ethno-federations seek to establish links with other close linguistic, cultural and ethnic groups outside the federation. These ties necessarily serve to promote and assert the national identity of ethnic federal units.

The Iraqi Kurdistan Region, part of the new Iraqi federal state, has been increasingly engaging in international relations as well, notwithstanding the fact that the federal constitution seems to deny the right to these activities and vests the central government with exclusive foreign policy making prerogatives. The Kurdistan Regional Government has official representations in many countries and plans to open more: "As part of the KRG's restructuring and outreach to the international community, we hope to open more representations abroad in the near future" (Mission statement, KRG Department of Foreign Relations). As of mid-2013, the KRG maintains representations at the level of head of mission and

governmental representatives in 12 countries: Australia, Austria, the European Union, France, Germany, Iran, Italy, Spain, Portugal, Switzerland, the United Kingdom and the USA.

Typically, federal constitutions, including that of Iraq, allow constituent units to contribute to foreign policy only through the federal government. Therefore attempts to engage in independent foreign policy cause suspicions and accusations of separatism. Quite often, however, the activism of federated units in international relations is more innocuous and should not be taken to mean *protodiplomacy* in Balthazar's terminology (Balthazar 1999: 100), which refers to a sub-national government's foreign policy and diplomatic efforts aimed specifically at gaining independence. While examining the paradox of federalism, this chapter's objective is to determine what kind of diplomacy—*para* or *proto*—the KRG is engaged in.

In the opinion of many, introducing federalism in Iraq was controversial equal to partition and laden with disastrous consequences for the country and the region (Galbraith 2006, Anderson 2006, McGarry and O'Leary 2008). The country suffers from a deep rooted division based on ethnicity and religious sectarianism, which has caused a significant degree of disloyalty to the central government. Many scholars agree that federalism may quell domestic conflicts in Iraq in the short run, but it will more likely contribute to separatism in a longer term. Some believe that the original intent of the Iraqi constitution makers—namely, managing conflict, ending sectarian and ethnic violence and resolving the underlying causes—may ultimately lead to a breakup of the country.

Creating a federal region in the north of Iraq was meant to quell ethnic conflict by satisfying the demands of the Kurdish minority for more cultural and economic autonomy and thereby preventing the disintegration of the country. The Iraqi constitution makers and their international assistants regarded federalism as one of the possible solutions to keep the country's unity. Federalism, as a form of areal distribution of power that requires an increasing role of the judiciary, was also viewed as a step forward to establishing quality democracy in the country (McGinnis et al. 2004).

## **The Argument and its Logic**

The activism of the Kurdish regional government in the international arena, as well as its continuous efforts to maintain its own independent security forces, may look like clear indications of purposeful actions aimed at secession and creation of a sovereign state. Therefore experts and the public at large have voiced suspicions that the Iraqi Kurds have a hidden agenda that they intend to break away from Iraq and use federalism as a subterfuge and a tool to carry out their plan. The prevailing alarming view has been well expressed by Charountaki who considers Iraqi Kurdistan an established independent actor in the international arena, or what she terms “self-existence of Iraq’s Kurdistan within international relations” (Charountaki 2011: 234). Doherty is convinced that KRG activism poses a

serious threat to Iraqi nascent federalism: “... diplomatic engagement and the development of foreign relations on the part of the KRG will have a serious impact on the viability of a unified Iraq ...” (Doherty 2011: 111).

This chapter argues, however, that the Kurdistan Regional Government’s active involvement in international relations, often in seeming defiance of the federal constitution, may find a reasonable explanation in its desire to assert national identity at home and abroad, not to secede.

Through active interaction with the outside world an ethnic group can enhance the construction of what Benedict Anderson called an imagined community. Obviously, international recognition gives more substance to the imagined community and foreign acknowledgment raises a community’s particular standing in the world, but also at home<sup>1</sup>.

The Kurdish Regional Government does not seem to seriously contemplate secession as a viable option because it is cognizant of many insurmountable obstacles on that road. The KRG leadership, despite occasional outbursts of populist rhetoric,<sup>2</sup> is pretty mindful of the consequences of pushing separatist aspirations too far. The Iraqi constitution does not grant the right to exit from the nation, which, according to some scholars, is a good thing for state-building and democratization (Sunstein 1991). In Iraq, there is no constitutionally mandated exit from the federation and any attempt to do so would signify a coup d'état with all possible consequences.

Nationalism has been and will most likely remain the most significant factor in politics. Even in stable democracies, like the United Kingdom, nationalist feelings are acute and get easily caught in politics. A recent story reported in the press on the legislative efforts of London to introduce summer saving time in Scotland is quite telling in this respect. Scots reacted angrily to this initiative and accused England of “tampering with our time” (*Inverness Journal*, January 20, 2011).

Horological disputes between Scotland and England may be viewed as a funny anecdote; yet the Scottish incident reminds us of pervasive deep-rooted nationalistic feelings ready to manifest themselves at any opportunity. Although nationalism has been widely recognized as an important factor in politics, very few authors view national identity as a variable in foreign policy and that is despite a well acclaimed direction in international relations theory opened by Samuel

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1 Ahmed reports that many in Iraq outside Kurdistan even today do not accept the appellation of Kurdistan and keep referring to the Kurdish federal region as *shimal al-Iraq al-Habib* (the beloved northern Iraq) in an effort to deny the region’s Kurdish identity (Ahmed 2012: 39).

2 In a recent statement, Massoud Barzani, the President of Iraqi Kurdistan, claimed the right to self-determination for Kurds (Barzani 2011). Barzani disavowed this statement later. While a year earlier he said, “Our fate and destiny is with that of Iraq. The Kurdistan region is part of Iraq ... We want to gain achievements for the Kurds and Kurdistan region, but also for all of Iraq. And we feel proud that the Kurds have been able to play this role” (Barzani 2010).

Huntington in *The Clash of Civilizations*. Indeed, when the Cold War ended, we realized that not everything in the international arena can be understood from the realist rational actor's perspective. Other factors have undeniably entered the realm of foreign policy making. The reason and interests of the rational actor are to be complemented by the passion of nationalism in order to more adequately understand and explain the nature of international relations. We have witnessed an explosion of ethnic and national identities and nationalism-driven politics in the post-Soviet republics. It is impossible to understand a single foreign policy initiative in Ukraine, for example, if the variable of national identity is ignored.

Iraq's Kurdistan provides an excellent illustration of how considerations relating to national identity can shape governmental policies. Now that the Kurds have acquired significant independence in a federal Iraq, their national identity has been strengthened not only through historiography and literature, but also through purposeful governmental action. This includes activism in the international arena to the point that the Kurdistan Region's "diplomacy" is often perceived as going beyond what the federal constitutional mandates, thereby causing suspicions in Baghdad and elsewhere.

## **Explanatory Framework**

"It may seem paradoxical that in a globalizing world with instant communication and a growing consensus on the values that should underlie a legitimate polity, we are seeing a resurgence of nationalism," states Michael Keating (2002: 388), to ultimately conclude that nationalism is not necessarily a backward notion and "new and revived nationalism" can find ways of being accommodated in "a new form of democratic order" (Keating 2002: 388).

Scholars have studied nationalism from various angles and recognized that national identities directly relate to social action and play a significant role in politics. The power of ethnicity and national identity was a variable of choice in the explanation of decolonization, liberation movement and associated political violence. Nationalism has recently taken a prominent place in democratic theory, as it is always linked to the mobilization of large masses of people. National identities and revived traditions have become topical themes of transition to democracy studies (Danilovich 2010).

Nationalism is a particularly powerful force in nascent polities with no prior experience of statehood, where nationalizing elites are desperate to create a nation-state at any price. Historically, unrealized statehood makes them strive for the implementation of the highly normative concept of polity, in which nation and state coincide (Smith 1998). Creative historiography, myth-making, revived traditions, and symbolism are widely employed to achieve this goal.

Martin Dent suggests federalism as a way to manage nationalism and reconcile the growing separatism of national minorities within large multi-ethnic countries. Under federal arrangements, national minorities establish an agreement over

internal affairs, national security and foreign policy (Dent 2004). The holding together type of federalism has proved a rather effective tool to manage and even end ethnic conflict through the division and sharing of political authority. Federalism, in the words of Daniel Elazar, is not only about “separate rules,” but also about “shared rules” (Elazar 1987: 12; Riker 1964: 11). Shared political authority and cooperation between the federal center and regions in many areas, including foreign policy are crucial for the unity and survival of the federal state.

The engagement of federal regions and other sub-national units in international relations has been well researched and documented. There is general agreement on why regional governments may be so active in the international arena. Keating (1999: 3–4) identifies three types of motivation: (1) economic, (2) cultural and (3) political. All three are typically present in regions’ international activities, with economics being considered the most significant factor (Lecours 2008: 7). Cultural motives are also important, as they enhance a region’s “international personality” (Lecours 2008: 7). Political motivations are close to both cultural and economic, as they underpin regional interests, be they economic or cultural. Political motivations, according to Keating, are present in cases where regions have a very distinct national identity, and Keating is inclined to link this activism to secessionist aspirations,

In those cases where regions encapsulate a sense of distinct national identity and a nation-building project, external projection is qualitatively different from those cases where it is motivated only by functional considerations. In the former, paradiplomacy is used in a highly political manner, either to prepare the ground for eventual independence or as an element in stateless nation-building. (Keating 1999: 13)

Political motivations to Keating also include the wish for strengthening regions’ cohesion in order to raise the status of regional politics, and possibly to achieve greater international recognition (Keating 1999: 4). This is particularly true for the engagement of ethnic federal regions in foreign policy, as it is directly related to national identity and nationalism.

In some countries, ethnic federations in particular, identity and cultural factors are more important than economic or political. Quebec in Canada, Catalonia and the Basque country in Spain, and the Belgian communities and regions are among the most internationally active federal units as they seek not only to serve their economic interests but also to create links with ethnically, linguistically and culturally-related communities abroad. In most cases such activities “help forge strong human links across international frontiers. But at times they have been used to serve, or have been interpreted as serving separatist goals and have thus become highly controversial at home. Quebec’s foreign relations under the separatist Parti Québécois is an extreme example of such actions” (Michelmann 2007: 6).

To better understand the manifestations of nationalism in foreign policy and international relations, Keating recommends going beyond the paradigm of nation-state and sovereignty:

Nationalist movements in stateless nations have been exploring new forms of post-sovereign self-determination, although there are important differences within and among them. There is as yet no post-sovereign political order to which they can accede, but the world is moving in that direction. (Keating 2002: 395)

One of the first scholars who have pointed to a possible cause-effect relationship between nationalism and foreign policy is Ilya Prizel. The main obstacle for connecting nationalism or national identity with foreign policy, he argues, is “that sociologists and political scientists who study nationalism rarely venture into foreign affairs as a major issue” (Prizel 1998: 2). The efforts of the Zionist movement to redefine and foster the Jewish identity led to the formation of the Jewish state. Israel constitutes an excellent example of how national identity can influence international affairs.

Prizel argues that interaction between national identity and foreign policy is a key element in both established and nascent polities, but this interaction is particularly important in newly emerging or re-emerging states, since nationalism and national identity are often the main if not sole force binding these societies together” (Prizel 1998: 2). “Therefore, continues Prizel, all polities, whether or not they are aware of it, have an identity that helps define their values and serves as the basis for ranking their priorities” (Prizel 1998: 2). The irrational and emotional aspect of national identity “plays a vital role in forming a society’s perception of its environment and is an extremely important, if not driving, force behind the formation of its foreign policy ... ” (Prizel 1998: 2). Professor Prizel looks, however, at foreign policy driven by nationalism in sovereign countries, like Poland and Ukraine, while similar efforts of sub-national, ethnic federal units and their engagement in foreign policy remain a rather enigmatic theme.

There are similarities in the foreign policy of ethnic federal regions and independent but unrecognized states; in both cases foreign policy is aimed at (1) the search for recognition of their identities, (2) acquisition of material resources through foreign assistance and investment, (3) demonstration of their institutional and other capabilities to engage in international relations, which ultimately boils down to the recognition of their identities through *de facto* acceptance as international actors (Owtram 2010).

The literature on a possible cause-effect relationship between foreign policy and national identity is in an embryonic state. The question of where and when national identity can become a political force capable of pushing a sub-national unit into the international arena, and the question of how much nationalism, as opposed to other causes—globalization and growing economic interdependence—are responsible for *paradiplomacy*, wait for an answer. The case of Iraqi Kurdistan

may shed some light on this curious aspect of international relation theory, but more importantly for us it offers empirical data to analyze how regions' activist diplomacy may relate to the paradox of federalism.

### *Federal Units and Foreign Policy Making*

Federal units and central government are divided constitutionally with a clear specification of policy areas for each. In a classical territorial distribution of power, local institutions typically possess authority over language, culture, education, healthcare, and some economic regulations, while international relations and security remain the exclusive purview of the federal center. In most contemporary federations, foreign policy and security remain the constitutional prerogatives of the federal government. As a general rule, federal constitutions leave no room to the governments of federated units for independent foreign policy.

Some scholars, like Fry, make a distinction between foreign policy and international relations that is quite useful for our study. Foreign policy to Fry is the goal that a country wants to achieve in the international arena; while cross-border activities of regions and federated unites are considered foreign relations (Fry 2009: 296). This distinction makes the foreign relations of federal regions more legitimate, as it seems to remain more innocuous in terms of compliance with the federal constitution.

By the nature of involvement in foreign policy making or international relations and its underlying causes, several cases are particularly relevant to Iraqi Kurdistan—Canadian Quebec, Belgium regions and communities. Both Quebec and the regions and communities have a significant number of representative offices abroad whose main goal is to strengthen their ties with foreign countries and to defend their interests beyond the national borders. These developments inevitably challenge the conventional conception of national monopoly over foreign policy (Duchacek 1990; Sharafudinova 2003) and beg for the examination of their underlying cause.

Nationalism and culture are among the factors that make ethnic federal units engage in international relations. Quebec, with the majority of French Canadians, seeks to build and strengthen relationships with French-speaking countries within *la Francophonie*, in order to achieve high international visibility and thereby strengthen its distinctive national identity. Ethnic and linguistic affinities play a crucial role in motivating the Belgian federal units toward undertaking foreign policy initiatives. For example, Wallonia tends to relate more with France while the Flanders seeks more relations with the Netherlands. These interactions allow cultural features, such as arts, music, architecture, food, and clothing to stay alive. Ethnic identities, not so much growing economic interdependence and globalization, determine the preferential international relations of the federal units in these two cases.

The Canadian constitution is rather vague over how much diplomacy the provinces can do. Although it grants exclusive right over foreign policy to

Ottawa, some provinces have gained a broad autonomy mainly through judicial interpretations. Quebec has taken advantage of some constitutional ambiguities and gained prominence in independent foreign policy making. The Belgium constitution explicitly gives significant powers over foreign policy to its regions and communities alongside the central government, without much of hierarchical relationship between the two levels.

International law poses some preconditions for federated units to be accepted as a *bona fide* player on the global stage: (1) national constitutional provisions authorizing federal units to engage in international relations, (2) recognition of federal regions by other subjects of international law. Recognition can also be gained through practice. In other words, recognition is a matter of fact and pragmatism, rather than abstract theoretical postulates or even constitutional provisions.

In consequence, Quebec in Canada and the regions and communities in Belgium have increasingly become recognized as international legal entities, with the ability to behave at the international level as autonomous actors alongside sovereign states to the point that they can sign international treaties. Canadian provinces have to consult with Ottawa over international treaties, but regulations in this area differ from one policy sector to another. Consultations between the federal government and provinces are not constitutionally mandated, but a good deal of consultative talks between provincial capitals and Ottawa take place.

The Belgium constitution explicitly states that the constituent units can sign treaties on their own for matters falling within their jurisdiction. However, in order to avoid incoherence of Belgian federal foreign policy, coordination procedures and mechanisms are established, mainly in the form of consultations. Consultations, meetings and annual conferences are held between officials from the central government and regions and communities to coordinate their actions in the international arena in order to keep national foreign policy consistent.

In both Canada and Belgium, the relationship between the central government and the federal units has been adjusted and reshaped over time based on various considerations. Autonomy demands in Quebec are influenced by its cultural and linguistic distinctiveness vis-à-vis the rest of the Canadian population. Belgium is also fractured because it includes two geographically based linguistic clusters. In Canada, the Federal Supreme Court has played a significant role in fine-tuning federal relations, while in Belgium federal relations are attuned through continuing constitutional reform, action of the Senate, the territorial chamber of the parliament, and a web of collaborative links across the federation (Amoretti et al. 2004).

Patrick Doherty asserts that Iraqi Kurdistan cannot be compared to Quebec or Flanders, as the latter operated under different constitutions to the point that these precedents “have little bearing on Iraqi Kurdistan when it comes to a question of legality” (Doherty 2011: 110). As we have seen earlier, the current well-adjusted relationship between Ottawa and Quebec City has had its moments; it has become balanced only recently and thanks to active judicial involvement. In Belgium, constant constitutional reform and an active territorial chamber of parliament have

allowed the gradual harmonization of the federal relationship, including the field of foreign policy and international relations.

Federalism in Iraq is a fledgling arrangement; mechanisms to attune the relationship between Baghdad and Erbil are not in place and are badly needed. Constitutional reform may be required in order to improve the federation. The establishment of a territorial chamber as prescribed by the Constitution is long overdue, and a more active Federal Supreme Court would help to harmonize the federal relationship. The precedents set by Canada and Belgium for federal units' international engagement show that active provincial diplomacy is not necessarily a sign of separatism. In both cases, among the most important factors behind foreign policy activism are language and national identity in general. Quebec is a culturally distinct province that seeks to assert its identity at home and abroad through activism in the international arena. It is evident that ethnic federal regions demonstrate significantly higher activism in the international arena than non-ethnic federal units. Just consider Alberta and Saskatchewan on one hand and Quebec on the other. Identity and culture in the latter case are factors that determine Quebec's significantly higher activism.

Effective culturally driven paradiplomacy has become possible due to the development and increased sophistication of federal units' institutions and the growth of regional economic and financial capacities. Federal units' activism also escalates when there is perception of the federal government's inefficiency, limited resources and lack of expertise and experts. Institutional deficiencies at the federal level, such as absence of a federal chamber, may also cause units' activism.

## **The Federal Constitution on Foreign Policy Making**

The first paragraph of Article 110 of the Iraqi Constitution identifies the matters over which the federal government has exclusive powers. The article states that the management of international relations is the exclusive authority of the federal government:

Formulating foreign policy and diplomatic representation, negotiating, signing, and ratifying international treaties and agreements, negotiating, signing, and ratifying debt policies and formulating foreign sovereign economic and trade policy.

For good measure, Article 121 (1) reiterates the exclusive rights of the federal government over foreign policy:

The regional powers shall have the right to exercise executive, legislative, and judicial powers in accordance with this constitution, except for those authorities stipulated in the exclusive authorities of the federal government.

More specifically, the fourth paragraph of the same article defines the way the federal unit(s) and governorates can be involved in foreign relations, the composition of diplomatic missions and representations abroad.<sup>3</sup>

Offices of the regions and governorates shall be established in embassies and diplomatic missions, in order to follow cultural, social, and developmental affairs.

This provision allows the Iraqi regions and governorates to be represented abroad through participation in federal diplomatic missions and representative offices and only for cultural, social and developmental affairs. In other words, diplomatic missions and representative offices are to be under the federal government's control. The regions and governorates cannot be involved in diplomatic activities on their own.

Alongside the exclusive powers of the federal government and the residual powers of regions and governorates, the Iraqi Constitution specifies the powers which both sides share. Article 114 restates the shared powers, and it doesn't include foreign policy and international relations. Power sharing in foreign policy making between the central government and regions and governorates are limited to domestic issues that can become internationalized, like exploitation of oil and gas fields.

The constitutional provision of Article 110, that ascribes the exclusive federal authority to formulate foreign policy, is somewhat mitigated by Article 115, which gives all residual rights (those not explicitly reserved for the federal center) automatically to regions. If the Constitution specifies who formulates foreign policy, its implementation may be understood as a legitimate prerogative of federal regions. There are constitutional provisions that are rather ambiguous with regard to issues relating to foreign policy. For example, the first paragraph of Article 112 states that,

The federal government, with the producing governorates and regional governments shall undertake the management of oil and gas extracted from present fields.

The second paragraph of the same article reads further,

The federal government, with the producing regions and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people using the most advanced techniques of the market principles and encouraging investment.

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<sup>3</sup> As reported in the press in 2005, the Kurdish parliament adopted a resolution, in which it formulated minimal demands to the Constitution-writing committee in Baghdad. Among the most important Kurdish demands was the one on legalizing Kurdistan's existing representations abroad (Lawrence 2008: 268).

It can be inferred from Article 112 that the KRG can use its power over the producing fields because the first paragraph says “management” and the second paragraph says “investment.” It is clear that such investments can be done in cooperation with international companies and foreign countries. As we have mentioned earlier, the absence of the Kurdistan Region’s own constitution relieves political players of constitutional constraints when they make decisions, including those relating to international matters.

In the realm of foreign policy making and international relations, the Kurdish draft constitution states:

Treaties and agreements, which the Federal Government enters into with foreign states, shall not be effective in the Kurdistan Region if they deal with matters outside the Federal Government’s exclusive jurisdiction in accordance with Article 110 of the Iraqi Federal Constitution, unless an absolute majority of the members of the Parliament of Iraqi Kurdistan approves the implementation of said treaties and agreements in the Region.

This clause would seriously jeopardize the federal relationship, as in the absence of the federal territorial chamber of parliament and in the absence of an active Supreme Court, who would be able to determine whether an international treaty concluded by Baghdad deals with matters outside the Federal Government’s exclusive jurisdiction?

Article 8 of Kurdistan’s draft constitution allows the KRG to “enter into agreement with foreign states regarding issues that do not lie within the exclusive jurisdiction of the federal authorities” and seems to contradict Article 110 of the Federal Constitution, which solely vests the right to enter into agreements with foreign states to the federal government.

The Kurdish draft constitution reflects the mindset of the KRG, which is eager to interpret the federal constitution quite differently than the federal government in Baghdad. The two parties therefore need an impartial umpire to constantly iron out existing and emerging differences and fine-tune the federal relationship. Michael Kelley, one of the international consultants on the Kurdish constitution-drafting team, claims that there is “a disconnect between *de jure* and *de facto* systems of Iraqi and Kurdistan foreign relations” (Doherty 2011: 102).

## **The Kurdistan Region’s Diplomacy**

Through history, foreign countries have played significant roles in the fate of Iraqi Kurdistan. Kurdish national and statehood aspirations have been caught in the geopolitics of the region: the Iranians positioned themselves as friends of the Kurds to exert pressure against the government in Baghdad in the 1970–1980s. Syria used Kurdish nationalism against its regional rivals, notably its support of the PKK in its struggle against the Turkish state. During the twentieth century, “the

Kurds have been used repeatedly by the US, Israel and Iran to destabilize the state of Iraq, then left to their fate once immediate strategic goals have been achieved” (Anderson and Stansfield 2004: 180).

More recently Kurdish “nation building received a tremendous boost from outside forces” (Bengio 2012: 245). Through the Kurdish diaspora efforts the ordeals of Halabja and Anfal were made known to the world. During Gulf War I, the Kurds received massive support and were more popular in the world than the Saddam Regime. Kurds engaged in quasi-diplomatic activities with the UN and other international agencies. A US diplomat, Francis Ricciardone, stated in 2000 that “Kurdish organizations now enjoy greater influence, access, credibility, and meaningful international relations than does the regime” (Meho 2004: 543).

However, the Iraqi Kurdistan Region was also consumed by a bitter rivalry between the two main parties, the KDP and PUK. Each of them tried to get their message across to the international community through their respective representations abroad; each attempted to reach out to foreign countries in a search of support for their respective causes. By the late 1990s, Turkey, the USA and Iran offered their mediation; obviously, that was done in pursuit of their own regional agendas. Their diplomatic initiatives and offers of mediation intensified the KRG’s interactions with the outside world. This added yet “another important dimension to Kurdish state building” (Bengio 2012: 246).

Since Baghdad was isolated by the international community and given serious efforts deployed by foreign countries to mediate during the inter-Kurdish conflict, Kurdish leaders were received not as representatives of Iraq, but in their own capacities as “ambassadors of their own Kurdish enclave” (Bengio 2012: 260). The change in the attitude towards Iraqi Kurdistan over the 1990s in the international community was dramatic. When Barzani or Talibani came to Washington to plead the Kurdish case shortly after the Gulf War no official would meet with them. “However, by the mid-1990s the change was such that the United States began to openly engage the Kurds and even court them” (Bengio 2012: 261). The poignant reports on the Halabja carnage and the plight of the Kurdish people by the mainstream media helped to win sympathy within the international public. “The Kurdish issue became internationalized and the Kurdish entity received a degree of legitimacy with the establishment of Kurdish diplomatic offices in Washington and other Western capitals—at a time (following the post-1990 sanctions) when Iraqi officials were banned” (Bengio 2012: 262).

Now after the creation of the Iraqi federation, the KRG keeps maintaining a very active international relations agenda, which seem to go way beyond what the Iraqi federal constitution allows for a federal region. This activism has caused what Ofra Bengio calls “the foreign relations imbroglio” (Bengio 2012).

On December 24, 2008, by Decree 143 the KRG Council of Ministers established a Department of Foreign Relations headed by an official at a ministerial rank. The Department was tasked with the coordination and facilitation of the Region’s relations with the outside world. The mission and objectives of the new department were spelled out on its official website:

- Strengthening the position of the Kurdistan Regional Government with foreign countries in the fields of politics, culture, social affairs, economy, and development ...
- Supervising the Kurdistan Regional Government overseas offices and endeavoring to strengthen the KRG relations ...
- Facilitating the missions of foreign representatives within the Kurdistan Region, and endeavoring to promote the region's bilateral relations ...
- Supervising the visits of foreign delegations to the Kurdistan Region ...
- Ensuring that the Kurdistan Regional Governments' message reaches out to the outside world ... coordinating with United Nations Agencies and International organizations in the Kurdistan Region ...
- Cooperating and coordinating with international companies and foreign investments in order to stimulate economic activity and enhance investment in the Region (Kurdistan Regional Government 2009).

Only the last objective pertains to economic and social activities and can be explained by the natural processes of globalization and growing economic interdependence. The five former seem to set forth the foreign policy and diplomatic activities of a sovereign state. The document contains no reference to consultations or coordination with the federal government.

The recently updated official website of the KRG Department of Foreign Relations reiterates the same objectives, but slightly downplays independent policy goals. The Department's mission has been amended by adding new objectives: "... maintain contacts with Diaspora communities abroad" and, more importantly for our study, cooperating with Iraq's Federal Ministry of Foreign Affairs:

The Department of Foreign Relations is headquartered in Erbil and is the focal point for international activities in the Kurdistan Region, *in coordination with Iraq's Federal Ministry of Foreign Affairs.* (Emphasis added—A.D.)

It should be noted that the KRG's Executive Order 143, which established the Department of Foreign Relations in 2008, contains explicit references to the federal constitution and states that each objective will be carried out "in coordination with the Ministry of Foreign Affairs of the Federal Republic of Iraq." Significantly, this phrase appeared on the DFR website only recently.

Over two dozen of foreign consular and representative offices have been opened and operate in the Kurdistan Region. The French government opened its office in Erbil on June 1, 2008. In the opening ceremony the French minister of foreign affairs said "the aim of this office is to strengthen the *diplomatic and political relations between the French government and the KRG ...*" (Emphasis added—AD). In December 2012, officials from the French Province of Dordogne signed an agreement with the Kurdistan Regional Government to encourage region-to-region ties. The Turkish consulate was opened three years ago and the Turkish Consul to the Region Ayden Saljar stated that its aim is to strengthen

commercial, cultural and *political* ties between Turkey and the Kurdistan Region (Anon 2010: 3). Russia also opened its consulate in Erbil to strengthen its diplomatic relations with the Kurdistan Region (Akram 2010: 3).

KRG representatives are received by foreign governments at the highest level. In 2006 President Barzani and his delegation were accorded a royal welcome in Kuwait. KRG Premier Barham Salih's official visit to Iran was surrounded by all the attributes of a head of state visit (Hussein 2009:6). In April 2010 a KRG delegation headed by KR President Masoud Barzani visited Saudi Arabia and Lebanon by invitation from the Saudi Arabia King Abdullah Bin Abdulazeez and Lebanese Prime Minister Saad Hariri. They were received by the Saudi King and the Lebanese president (Anon 2010: 2).

In turn, foreign top officials pay frequent visits to the Region; US Vice-President Joe Biden and the Defense Secretary Leon Panetta, as well as former State Secretary Condoleezza Rice, US Vice President Dick Cheney, and the Turkish Prime Minister, Minister of Foreign Affairs and Minister of Interior have recently paid official visits to the KRG. Amir Musa, the Arab League secretary general, visited Erbil in January 2011. He met with the President Barzani and discussed ways to reconcile Iraqi Sunnis and Shi'a.

Obviously, foreign officials are more interested in promoting their countries' commercial deals with the oil rich region, but by doing so they contribute to the KRG's active international agenda. The KRG has signed over 40 oil contracts with companies from the US, Australia, Canada, South Korea, India, Turkey and Russia. The KRG's foreign investments have reached \$15 billion coming from a dozen of neighboring Arab and Western countries. There are approximately 6,880 foreign companies operating in Kurdistan of which 1,629 have heavily invested in the Region, Turkey being the largest direct foreign investor.

The scope of agreements and contracts that the KRG signs extend beyond oil and cover political, social, economic, cultural and athletic aspects. For example, nearly 73 memorandums of understanding have been signed in the fields of education and culture between the KRG and foreign universities and institutions. On June 21, 2008 a French cultural delegation organized the "Fete de La Musique," a flamboyant musical festival in Erbil attended by representatives of over a hundred countries.

In 2008 the KRG signed two agreements with the United Arab Emirates to train KRG personnel; some 150 civil servants from different governmental agencies took part in this professional development program. A US delegation headed by the US State Secretary of Trade, and accompanied by officials of the US Chamber of Commerce representing major US companies, visited Iraqi Kurdistan to discuss and plan future US investments in the Region. On May 11, 2008, the KRG signed an economic agreement with the Russian Federation, considered one of the most significant trade deals of its kind. In June 2008 a memorandum of understanding was signed between the KRG and the Lambaridia Region in Italy to enhance commercial and trade relations; the Lambarida Region offers training programs to Kurdish businessmen and entrepreneurs (Berzinji 2009: 32).

## The Politics of Flag Hoisting

Gods made the flag so they'd know who the good people were

The Kurds in general are fond of symbolism; among the most important ones are the Kurdish flag that features pre-Islamic symbol—Zoroastrian Sun, Nowruz, the Kurdish national day celebrates the victory of prehistoric times and at the same time the Kurdish New Year and finally the anthem that contains such lines as “Both our faith and religion are our homeland” (Rafaat 2012: 32; also 130–35).

The national flag is the single most important symbol through which a nation proclaims its identity and cohesiveness. A flag is a “condensational symbol”—a symbol with connotative meaning affected by emotions from which multiple and conflicting interpretations may emerge (Edelman, 1964; Norton, 2004). The Kurdish flag has particular significance for this stateless nation. It was first hoisted to mark an independent Kurdistan, the Republic of Mahabad in 1946 in the territory of Iran. Since then, this red, white and green banner has been a rallying sign for all Kurds and a symbol of Kurdish national identity.

All KRG offices in foreign countries fly the Kurdish flag. At one period of time its representations in the US, the UK, and in the Bern diplomatic area in Switzerland flew only the Kurdish flag, as opposed to today when both the federal and regional flags are hoisted.

The Iraqi national flag was not raised on official buildings in the Kurdistan Region proper until recently. As reported in the press, in Fall 2006 the leadership of Iraq’s Kurdistan Region ordered local officials not to fly the Iraqi national flag.

According to the Kurdistan Administration of Iraq’s decree number 60, we decide to hoist the flag of Iraqi Kurdistan officially on all offices and government institutions in the Kurdistan region, a statement said. (AFP, Sept 1, 2006)

The order from Kurdish president Masoud Barzani’s office in Erbil also said that “regions in Iraq’s Kurdistan which have been hoisting the Baathist flag should lower it and hoist only the Kurdistan flag.” This move is understandable as “... it was under this flag that Saddam’s regime destroyed more than 5,000 Kurdish villages, used chemical weapons ... killed more than 5,000 innocent civilians and waged the *Anfal* campaign in Kurdistan in which more than 180,000 people were slaughtered” (Aziz (2011: 130).

Because of the flag issue, a sort of diplomatic embarrassment occurred in 2006 when a highly ranked official of the Arab League, Mukhtar Lamani, visited Erbil and met with President Barzani, but the Arab League representative did not see the Arab flag, only the Kurdish banner (Ahmed 2012: 51).

It is fair to mention that since 2008, the Iraqi national flag has been slightly modified and Ba’athist symbols were removed<sup>4</sup>. Although the new national flag

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4 The three stars were taken out, while the Takbir was left written in green Kufic script.

has not been approved by the Iraqi parliament as yet, the KRG made a decision to hoist this provisional national flag on all KRG official buildings alongside the Kurdish flag, in a clear sign of good will and acceptance of federalism. I personally checked all official KRG buildings in Erbil, the Region's capital city, in March 2013, including the central prison, to ascertain that the red, white and black banner (federal flag) flies side by side with the Kurdish red, white and green banner on all KRG governmental buildings. This proves some analysts wrong who predicted that the Iraqi flag would not likely to be flown any more in Iraqi Kurdistan (Raphaeli 2006: 3). The very decision to fly the Iraqi national flag alongside the Kurdish one on all government buildings, including KRG representations abroad is very symbolic and can mean only one thing—acceptance of the Iraqi federal system.

### **Inefficiency of the Central Government**

Unlike the federal government in Baghdad which lost thousands of skilled civil servants in the process of de-Ba'athification, the KRG has been gaining experience of administering governmental affairs. It has been drawing on highly educated individuals from the Kurdish diasporas abroad, as many Kurds living overseas are now eager to return to Iraqi Kurdistan. Almost all the KRG ministers and top administrators of state bureaucracy have been trained in the West and hold Western university degrees. The former Prime Minister, Barham Salih, holds a PhD from the University of Liverpool, and Minister Mustafa Bakir, the Head of the Department of Foreign Relations, holds several academic degrees, including a diploma from Harvard.

Purposeful efforts are deployed to train Kurdish civil servants. In 2009, 150 governmental employees underwent professional development in Saudi Arabia. Western-style universities and schools are mushrooming in the Region. All these give the KRG a significant competitive advantage vis-à-vis the federal government in administrative efficiency, good governance and progressive outlooks. Therefore, inefficiency of the central government in many areas pushes the KRG to take certain initiatives in its own hands. A recent press report can serve as an illustration. At the end of 2010, Turkey cut electric power supply to the Dohuk governorate. The decision came after the Iraqi government had not renewed the contract with Turkey. "The Kurdistan government used all of its efforts to convince the Iraqi government to renew the contract, to no avail" (The Kurdish Globe No 290, January 30, 2010). Obviously, under these circumstances, the KRG had to act and engage in international relations to restore power supply to the Region.

One of the reasons the KRG representations abroad do not maintain permanent contacts with the federal embassies is that formal diplomatic representatives are more bureaucratized and, like the embassies of other sovereign states, have to follow rigid diplomatic rules and patterns of behavior. The KRG envoy to the UK, Rahman, said: "We're much more proactive" [than the Iraqi national

embassies] in lobbying, attracting investors and generally promoting the Region. “We shouldn’t have to wait for the federal government … We want to bring the rest of Iraq with us” (Doherty 2011: 108–9). Regional diplomacy seems to have a more “light-footed approach” and thereby is more efficient.

### **Kurdish Elites on Kurdistan’s Diplomacy**

When asked whether the KRG activism in the international arena is caused by the desire to break away from the federation, all our respondents, governmental officials and not, answered our question in the negative.

We look for international support for the Kurdish position, and the Kurdish point of view to be known in the world. (Abdul Rahman, KRG representative in Great Britain, 2010)

We had made a conscious decision after the liberation of Iraq that we voluntarily become part of Iraq. We are committed to a federal, democratic and pluralistic Iraq. We have demonstrated our commitment. We have Kurdish members of parliament, ministers, and the Iraqi president is a Kurd as well. (Abdul Rahman 2010)

At present our policy, the KRG’s policy, is to be part of a federal democratic Iraq. Hence, all our diplomatic activities are in line with the policies of the federal government. (Jhaf 2010)

Today independence of Kurdistan is meaningless, by the way, I am nationalist, I have grown all my life as a nationalist and a very fundamental nationalist, but I reached to a point that we should have a realistic view. Thus, independence today is not the real target of the KRG … The KRG has no vision and no plan to secede from Iraq because, first, economically, it is in our advantage to remain part of Iraq; second, the meaning of independence today is not the meaning of independence a hundred or fifty years ago. Today you can do all you want to do as a state without declaring independence because independence is going to bring more problems to the Kurds than what we have today. (Ihsan 2010 cited by Muhammed 2010)

KRG external policy has been belligerent. The Kurds need to be realistic—independence is not in our national interests. While the idea of self determination is inherently positive, the Kurds will never be able to produce a self-sustainable autonomy. Therefore, their best and only option is to increase cooperation with Baghdad. (Internet blogger)

## **Discussion and Conclusions**

In this chapter, we attempted to explain the Kurdistan Federal Region's increasing engagement in international affairs in relation to the paradox of federalism. We argued that the KRG's diplomatic activism is not a sign of concealed separatist intentions, but a result of the desire to assert national identity at home and abroad and the outcome of many historical circumstances.

Iraq adopted the ethnic holding-together type of federalism to prevent the country from a breakup through accommodation of the Kurdish minority. Although the Iraqi constitution provides for the creation of other federated units, only the northern region of Iraq has formed a federacy-type relationship with Baghdad as of now. Kurdish politicians played an important role in Iraqi constitution making, accepting the USA-sponsored idea of federal division of powers in Iraq, and have carved out a significant political autonomy within the Iraqi constitutional system. The Iraqi Kurdistan Region has an elected parliament and all governmental structures necessary for carrying out state functions.

Similar to Quebec's policy aimed at preserving and enhancing its ethno-cultural distinctiveness within Canada, the Kurdistan Region has deployed significant efforts to assert its identity and to make itself heard within the newly established Iraqi federation and beyond. Federalism has significantly reduced the separatist mood and offered the Kurds new opportunities. While some regard Kurdistan's active diplomacy with suspicion as a threat to the unity of Iraq, our evidence suggests that Kurdistan's engagement in international relations is not intended to break away from the Iraqi federation. The KRG enthusiastically espouses the new federal relationship with Baghdad and has even gradually surrendered certain attributes of the independence it had achieved in the 1990s. Thus on October 4, 1992, the parliament of the Iraqi Kurdistan Region, detached from Iraq under the no-fly zone measures, voluntarily declared Iraqi Kurdistan a federated unit in a federal Iraq. Even then, under the adverse conditions of the Saddam regime, the Kurds opted for living together.

The KRG is active in the international arena and wants more links with other countries via open-door policy. Minister Falah Mustafa Bakir brushed aside accusations of KRG foreign policy excesses or speculations about KRG foreign relations going beyond what the federal constitution prescribes. Although Article 110 of the Iraqi constitution that reads "The federal government shall have exclusive authorities in formulating foreign policy and diplomatic representation" seems to prohibit the federal region's engagement in independent foreign policy making, the Minister puts emphasis on the word "formulation." In his view, Baghdad formulates foreign policy in broad terms, while the KRG fills it with concrete content. He believes that KRG activities in the international arena fit neatly into the foreign policy developed by Baghdad.

Mohammed Ihsan, Head of the KRG representation in Baghdad, confirms that KRG international activism does not infringe on the federal constitution, as the KRG only implements foreign policy formulated in Bagdad (Mohammed 2010: 61).

For example, the KRG has no foreign offices in countries with which Iraq does not have diplomatic relations<sup>5</sup>. If a country wants to have a consulate in the Kurdistan Region, the KRG Department of Foreign Relations refers it to Baghdad for authorization by the federal Ministry of Foreign Affairs. This is also corroborated by the opinions of Azad Barwari, KRG Deputy Prime Minister (2010); Bayan Sami Abdul Rahman, KRG representative to UK; Burhan Jaf, KRG Mission Head to EU; and Frederic Tissot, French Consul General (Mohammed 2010). At the same time, it is true that “should things in Iraq start to go ugly, a Kurdish attaché within each Iraqi embassy in all the world’s capitals would have a chance to spin the story their way” (Lawrence 2008: 270).

Even though some clauses of the Iraqi constitution are not clear enough and may lend themselves to various interpretations, the KRG wholeheartedly espouses the idea and the spirit of federalism. But smooth and harmonious federal relationships cannot be achieved overnight. No efficient federal institutions are in place to harmonize the relationship between Baghdad and Erbil, which leaves room for suspicions, mistrust and mutual accusations. The KRG often complains about non-implementation of the constitutional provisions by the federal government and finds excuses and moral justifications for its activism in the international arena. At the same time, the KRG is willing to openly address this issue. The Department of Foreign Relations has established a formal channel of communication with the federal Ministry of Foreign Affairs by appointing a coordinator and establishing a committee “to determine the nature and mechanisms of the KRG’s representation within the Federal Ministry” (Doherty 2011: 107).

The KRG representations abroad have been established by executive orders with a view to following the “cultural, social and developmental needs of this region” (Mohammed, 2010: 65). Regretfully, the KRG representatives abroad do not always coordinate their activities with the respective Iraqi embassies or the federal Ministry of Foreign Affairs. Minister Bakir apologetically says, “... we are trying to find a mechanism for a cooperative relationship between the KRG offices abroad and the Iraqi embassies, so that we avoid this sensitivity, because we do not want to go beyond what the constitution mandates” (Bakir 2010). Abdul Rahman, the KRG representative to Great Britain, concurred with the Minister by admitting that none of the KRG envoys holds a diplomatic rank, unlike federal attachés (Meeting at the University of Kurdistan-Hawler).

Unlike in Canada and Belgium, there is little cooperation and consultation between the KRG Department of Foreign Relations and the Federal Ministry of Foreign Affairs. The major reason is that the Iraqi leaders seem to regard KRG international activities as a threat to the country’s unity. From the interview with Minister Falah Mustafa Bakir we also inferred that the Ministry of Foreign Affairs in Bagdad has the tendency to treat its Kurdish counterpart as a junior partner. The

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5 It is fair to note that there are some discrepancies in the assessment of international events by Baghdad and Erbil. The KRG has clearly expressed its sympathy for Syria’s uprising while Bagdad supports the Syrian government.

federal ministry does not engage the KRG in consultations, and does not invite its personnel to take part in training programs the Federal Ministry organizes for its diplomats; it does not let the KRG be adequately represented in the Iraqi national delegation to the United Nations, for example. Curiously enough, the federal Ministry of Foreign Affairs is headed by an ethnic Kurd.

Another proof in support of our argument that KRG's active diplomacy is not a sign of separatist intentions is the fact that Kurdistan had had representative offices abroad long before the current constitution was enacted in 2005 and carried out diplomatic activities in line with the KRG's own laws and regulations. What is more, Article 141 of the federal constitution seems to authorize the activities by stating that all the laws and regulations enacted by the KRG since 1992 shall be considered valid. That constitutional provision fully absolves the KRG of accusations of unconstitutional diplomatic activities.

As a matter of fact, the KRG's foreign offices existed long before 2005. It is quite interesting to note that prior to the creation of the Kurdish Regional Government, the two Kurdish major political parties, as many typical national liberation movement parties, maintained formal relations with foreign countries, reaching out abroad for support. For example, the former KRG Prime Minister, Bahram Salih, served as the PUK's official representative in the United Kingdom. A typical national liberation movement party has, in an embryonic form, all state structures and functions ranging from security to foreign relations and even its own judiciary. Now when they are governmental parties, they realize that they need to give up many of their earlier functions and adapt to their new roles. This process is gradual and ongoing.

The opposition parties in the Kurdistan Region pressure the two main parties in power to give up their former structures and functions and surrender them to the government of Kurdistan. One of the leaders of the Gorran Movement<sup>6</sup>, Hama Tofic Rahim, said in a recent interview that the opposition's political reform proposal, known as a six-package reform project, requires the establishment of the Region's national security council to run the Region's external relations and regulate the relationship with the Iraqi central government in Baghdad. He also suggested changing the way the KRG's representations abroad are currently formed. According to Hama Tofic Rahim, today there are no KRG representations abroad, there are only the two parties' representations; the two main parties (KDP and PUK) have agreed among themselves to send their respective representatives. In his words, they are not Kurdistan's representatives, they are the parties' representatives.

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6 Goran holds 24 of Kurdistan's parliament's 111 seats, which makes it the second largest block. As a result of the September 2013 legislative elections, Goran has moved from the third to second position in the regional parliament, outperforming PUK (18 seats), a heavyweight in the previous parliament. Now the opposition block led by Goran includes the Kurdistan Islamic Union (10 seats), the Islamic Group (6 seats) and four seats by smaller parties.

According to the opposition's plan, the Region's National Security Council should take over the KRG's external relations. Mr Rahim also urged the Kurdish Democratic Party and the Patriotic Union of Kurdistan to surrender their control over the *Peshmarga* to the Region's National Security Council, as well as Asayish and other secret services (Kurdish Globe, No 343, March 3, 2012).

Since the uprising in 1991 and the formation of the KRG, the regional government has gone a long and convoluted way in its relationship with Baghdad—from outright hostility to full acceptance and enthusiastic participation in Baghdad's new government. The idea of federalism and increasingly cooperative relations with Baghdad have been part of this itinerary. In the process of making a federation, the KRG has passed on many functions back to Baghdad that it had acquired as a result of its bitter struggle and standoff with the Saddam regime in the 1980s–1990s. This has happened despite the fact that the 2005 Iraqi Constitution recognizes not only the Kurdistan Region's governmental structure, but also “all of the Region's laws, contracts signed since 1992” (O'Leary 2008: 38).

The introduction of ethnic federalism and the ensuing new relationships in the country have empowered the Iraqi Kurds and given them new opportunities to strengthen their identity beyond historiography and literature through governmental action. In the words of Michael Kelley, the KRG and Massoud Barzani have been “interested in shoring up the image of Kurdistan internationally” (Doherty, 2011: 103), which fully corroborates with our argument.

If the KRG had secession on mind, this process would not have happened. There is no doubt that the KRG is in favor of a unified Iraq, as long as Baghdad demonstrates cooperation and good faith. It is also obvious that the Kurdistan Region's recognition in the international arena gives the KRG additional bargaining leverage in its relations with the federal center. The seemingly controversial diplomatic representations of the KRG abroad are being gradually validated by Baghdad; Baghdad has recently promised to confer diplomatic titles and ranks on KRG representatives abroad.

Minister Falah Mustafa Bakir explained that the KRG foreign offices are not meant to defy the federal constitution and federal government. He is convinced that the existence of the current KRG foreign offices does not contradict the constitution. The requirement of the federal constitution that regional representations should be in the Iraqi embassies does not mean literally “within an embassy's physical premises.” They can be in separate buildings, as long as their activities do not undermine the overall foreign policy of the Federation.<sup>7</sup>

The federal Iraq is still far from providing cooperative synergy in relations between the central and regional levels of government, but the federal relationship shows no alarming signs that the federation is falling apart. Quite to the contrary,

7 Interestingly, “only the office in Bern, Switzerland, is in the same immediate neighborhood as its Iraqi counterpart ... The KRG representation to Australia is not in the same city as the Iraqi Embassy—while the latter is in the capital city of Canberra, the former is in Sidney ... ” (Doherty 2011: 104).

the only federated unit of Iraq demonstrates good will and the desire to improve the collaboration with the federal center in the sensitive matter of foreign policy. The main driving force behind the KRG's activism in international relations is the desire to strengthen the Kurdish community and to promote its interests.

We are well aware that Kurdistan's diplomacy cannot be fully understood as a culturally driven phenomenon only. Undeniably, economic factors and the desire of the Kurdish elite to benefit from lucrative contracts with foreign companies play an important role, which will be covered in other sections of this volume.

The main aim of this chapter has been to gain a better understanding of how Kurdistan's active diplomacy fits into the Iraqi federal design and to question the prevailing view that the Iraqi Kurds defy the federal constitution by an aggressive engagement in international relations in pursuit of the secessionist agenda.

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# Chapter 5

## The Federalization of Natural Resources

Francis Owtram

Recent academic and policy literature has focused on a range of issues concerning the sharing of revenues from oil, in particular in disputed territories such as Kirkuk and protracted negotiations over oil deals (Anderson and Stansfield 2009a; ICG 2008 Natali 2008; 2012a, 2012b, 2012c). In Iraq since 2003, issues of transparency over foreign investment in relation to oil have been of particular salience bringing into sharp focus sensitive questions such as motives for external intervention, nationalization, ownership and corruption. In the case of the Kurdish Regional Government (KRG), they also intersect with issues of the nature of federalism, the Iraqi constitution and the apportioning of powers in the newly constructed, negotiated and contested federal Iraqi state. Of increasing salience in all this are the political tensions in the relationship between the Kurdish Regional Government in Erbil and the federal government in Baghdad.

This chapter reviews the provisions in the constitution for development of the natural resources of Iraq in the context of theories of federalism. It then examines firstly, water, and then three contracts signed by the Kurdish Regional Government (KRG) with international oil companies: the awarding by the KRG of contracts to two American oil companies (Hunt Oil and Exxon) and a Norwegian oil company (DNO) illustrates important issues relating to federalism in Iraq and the Kurdistan Region's place in it.

The argument advanced, building on the exiting literature, is that for Iraq, as an artificial state issuing from the process of colonial state formation which culminated in the authoritarian and genocidal regime of Saddam Hussein, federalism may be the last best hope for Iraq to maintain its state integrity. With regards to the case studies, even if there are circumstances which “undermine” the legitimacy of the process of negotiation of the constitution this does not, in our view, negate the arguments for federalism. However federalism is a largely US foisted solution although supported by significant components of the groups that constitute Iraq, principally the Kurds. Following the withdrawal of US troops at the end of 2011, it still remains to be seen whether the different Iraqi elites will have sufficient commitment to this project, and be willing to engage in the necessary trade-offs and compromises which will be essential components for a peaceful resolution of conflicts over such resources as oil (Anderson and Stansfield 2009a). As Anderson and Stansfield note:

Even fundamental questions concerning the future of Iraq itself, particularly whether it will be truly federal or federal in name only, remain unresolved. Each one of these issues constitutes a significant challenge, and each requires concessions to be made in an environment that is far from conducive to compromise and consensus. Rather, the relationship between Baghdad and Erbil is characterized by suspicion, animosity and brinkmanship (2009b: 134).

A related insight is that, in a sense, the constitutional provisions are merely the procedural ephemera of a new stage of a struggle for power between the different elites involved; all the actors understand this and are biding their time. The chapter first notes the colonial creation of Iraq as an artificial state with intrinsic deep divisions. It then moves on to consider the nature of federalism as a way of potentially managing these divisions in respect to the key issue of natural resources. The three case studies of DNO, Hunt Oil and Exxon follow. The chapter concludes with some thoughts on the actual implications of federal provisions in the game of Iraqi politics in which the covert economy of oil and corruption is an underlying reality. With reference to the “paradox of federalism” it finds that the current federal framework may, in the short to medium term contain the struggle for power and resources that characterizes Iraqi politics, as the parties involved all benefit from a form of political stalemate. Over the longer term a re-negotiation over the type of federalism, and specifically provisions relating to natural resources may come about given the constraints of regional geopolitics.

### **Iraq: Ethno-Sectarian Divisions and Oil**

Anderson and Stansfield contend that in the absence of the discovery of oil in Kirkuk the British might have supported the creation of a Kurdish state (2009a: 23), a further aspect of the “curse of black gold” in the case of the Kurds. Prior to 2003 the Ba’thist Iraqi regime to some extent used all of the macro-methods of ethnic conflict regulation in the taxonomy supplied by McGarry and Edwards under the sub-section “methods for eliminating difference”: act of genocide, forced mass population transfers, integration and assimilation (McGarry and O’Leary 1993 cited in Milton-Edwards 2006: 229). The history of the Iraqi state has unfortunately given one of the prime examples in the world of ethno-communal conflict culminating in an act of genocide in Halabja. At the time following their geopolitical interests key western powers such as the US and UK chose to ignore this genocide (Hiltermann 2007).

Underlying much of this authoritarian state building process was the attempt first by colonial powers and then of subsequent Iraqi regimes to control the oil resources of Iraq (Kane 2010: 6; Tripp 2007). Set in this historical context this chapter explores the management of political tensions over oil with regards to post-2003 federal Iraq with a special focus on the Kurdistan Region and its relationship with Baghdad in this ongoing process of negotiating federalism.

## Federalism and its Natural Resources Management Potential

A key volume for the purposes of our discussion of natural resources is the collection of chapters contained in *Constitutional Design for Divided Societies* edited by Sudit Choudry (2008). McGarry and O’Leary have assessed the nature of the debate over managing ethnic diversity in divided polities aspiring to democratic forms (2008). They “identify two broad choices for democracies for managing national and religious diversity: integration or accommodation” (2008: 342). They contend that regarding Iraq integrationists call for “a strong, centralized and ethnically impartial Iraqi state which they see as necessary for a multiple reasons . . . ” (2008: 344). They proceed to identify the accommodation strategy with consociation and further distinguish this into “corporate consociationalists” and “liberal consociationalists.” Corporate consociationalists divide polities on the basis of ascribing pre-conceived notions of ethnic or other divisions. Liberal consociationalists take their lead from the notions of group which follow from the expression of electoral opinion. Favouring a liberal consociationalist perspective they advance their argument on what the 2005 constitution stipulated regarding the management of oil (2008: 351–2).

In connection with Iraq, McGarry and O’Leary (2008) and O’Leary (2007) set out a persuasive argument in favour of a liberal consociationalist approach. They advance arguments addressing two disputed issues relating to the 2005 Iraqi Constitution. Firstly, what is the position of the 2005 Constitution about several issues relating to federalism including federalizing natural resources? Secondly, they argue in favour of what they see the Constitution has laid the broad guidelines for, namely, pluralist federation, and against revisions to the Constitution in the direction of what they identify as centralized state as recommended by an integrationist approach. Their arguments are so germane to our discussion; it is worth considering a number of passages in full. Firstly, in relation to the location of governmental competence in the Constitution.

Those who argue that the Iraq federation is weak (that is, decentralized) usually point to the Constitution’s provisions on natural resources; they argue, correctly, that Baghdad’s control over the country’s natural resources is a *sine qua non* for centralization. The Constitution makes clear that natural resources are not an exclusive competence of the federal government. Article 111, which states that “oil and gas are owned by all the people of Iraq,” is deliberately not a sub-clause of the preceding article 110, which specifies precisely the exclusive competences of the federal government. Article 111 should also be read in conjunction with article 115, which states that all powers that are not exclusively federal competences belong to the regions (and governorates not organized into a region), and that where competences are shared and there is a clash, then the regional laws prevail. Article 111 should be read, too, in conjunction with article 121, which establishes that the regions have a general power of nullification outside the domain of exclusive federal competences.

Furthermore they go on to argue in regards to the constitutional stipulations concerning the management of oil:

Article 112, the second important constitutional article dealing with oil and gas, states that the “federal government, with the producing governorates and regional governments shall undertake the *management* of oil and gas extracted from present fields,” and that “the federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people.” Article 112 is also subject to articles 115 and 121, which authorize regional legal supremacy. Together, these clauses make it plain that the federal government’s constitutional role in control of oil and gas is prescribed and delimited in a number of ways; it is managerial, shared with the regions and governorates; subordinate to the regions and governorates in the event of clashes; and confined to current fields. Nothing in these provisions, however, prevents the Iraqi federal government—in concert with its regions—from agreeing on co-operative arrangements that resemble those proposed in some versions of the draft federal oil bill. (O’Leary 2008: 351)

The constitution, O’Leary argues, confirms Iraq’s reality, which he sees as divided into four main parts: Kurdistan, Baghdad, a Shia Arab-dominated south and a Sunni west and center. Further federated regions can be formed apart from Kurdistan—for example, a large southern region. O’Leary notes that it is principally neo-Baathist Sunni Arab elites, jihadists and the followers of Muqtada al-Sadr among the Shia who espouse strongly the idea of a centralised Iraq. According to O’Leary this view is surprisingly empathized with or supported by the international community oftentimes including the United States perhaps aware of the concerns of Turkey. In so doing, they erroneously equate pluralist federation with complete disintegration which thus encourages neo-Baathism (O’Leary 2007: 199). O’Leary was writing in 2007 and the relationship between Turkey and the KRG has markedly improved now with implications for natural resources, a development that will be reviewed later in the chapter.

A further aspect of the current Iraqi federal system of relevance to this chapter is that of asymmetrical federalism. Liam Anderson in his contribution to *Unrecognized States in the International System* notes that as defined by John McGarry (2005), asymmetrical federalism exists when “one part of a country enjoys a formally distinct degree of autonomy from the rest.” Further, according to McGarry, asymmetrical federalism,

(...) can occur in federations, when one or more of the federal units have a distinct status, or in (partly decentralized) unitary states, when only one part of the state enjoys autonomy or when it enjoys a distinct type of autonomy.  
(McGarry 2005 cited in Anderson 2011)

The significance of the issue of asymmetrical federalism will be returned to later in the chapter. Anderson notes that Iraq operates as a *de facto* federacy even though its constitution defines it as a federation. The Iraqi federal system consists of the 18 governorates; Article 119 stipulates that the governorates may obtain increased autonomy by voting to become a federal region. However, due to the powers held by the Baghdad government such as control of revenue stream, timings of elections, and to remove governors, Anderson contends, whilst the notion that the governorates are self-governing under the Iraqi constitution is “technically true” it is empirically false (Anderson 2011: 1961–97). Anderson goes onto note that the place of the Kurdistan Region of Iraq is ambiguous due to the Iraqi constitution being unclear and even contradicting itself.

The exclusive powers of the federal government are listed in Article 110 and competences shared between federal and subunit governments are given in Article 114. It is clarified in Article 115 that “all powers not stipulated in the exclusive powers of the federal government belong to the authority of the regions and governorates that are not organized in a region.” Anderson argues that this apparently clear statement of a reserved powers doctrine is controversial “because the management of oil and gas resources is not listed as an exclusive power of the federal government in Article 110.” The Kurds, he notes, have taken this to mean that regions have the right to manage hydrocarbon resources on their territory. In addition, Article 121 (2) holds that in situations where federal and regional law clash in areas outside the exclusive powers of the federal government, the regional government “shall have the right to amend the application of the national legislation within that region.” For Anderson the acceptance of this interpretation in all of Iraq would place the Kurdistan Region as one of the federated entities with most power anywhere in the world; however this interpretation is subject to dispute as is even the legitimacy of the constitution itself (Anderson 2010: 1961–97) as we will now examine in relation to the natural resources of water and hydrocarbons.

## Federalization and Water as a Natural Resource

We will shortly consider three case studies which in different ways illuminate debates over the process of federalization of natural resources, specifically oil, but first we also consider a natural resource which in the long run is arguably more important: water. In contrast to oil, O’Leary (2009) notes that there were no disagreements in principle over the constitutional articles relating to water which could augur well for the prospects for a loose federation. In the first place, Article 50, the constitutional oath of the members of the Iraqi Council of Representatives, places an obligation on the members to “ensure the safety of [Iraq’s] land, sky, water and federal democratic system.”

Water, however, is federalized differently from oil and natural gas. Article 110 stipulates the “exclusive” powers of the federal government and allocates the federal government sole responsibility for policy on water flowing into Iraq from

neighboring countries and also allocates it a role in organizing a fair distribution and flow of water within Iraq. It specifies the exclusive authority of the federal government as “Planning policies relating to water sources from outside Iraq and guaranteeing the rate of water flow to Iraq and its just distribution inside Iraq in accordance with international laws and conventions (UNAMI)” As O’Leary notes, “This may be fairly interpreted as giving the predominantly Arab parts of Iraq a federal stake in the rivers that begin in Kurdistan and as warranting the federation an international lead role in negotiating waters” (O’Leary 2009).

Kilic (2012) argues however that, in much the same way as there is over oil, there exists an ambiguity over the constitutional provisions concerning water resources. The Constitution categorizes water resources as external and internal to Iraq and ascribes exclusive authority to the federal government in management. The Kurdistan Region of Iraq has an important role in terms of water as its mountains give rise to a number of tributaries that flow into the Tigris. Furthermore Kilic specifies that the Dukan and Darbandikhan hydro-electric power projects lie within the region and that the greatest dam of Iraq, the Mosul Dam, whilst not in the three governorates constituting the region is *de facto* under the control of the KDP and PUK. Article 114 states the competencies that are shared between the federal and regional authorities and the seventh point specifies “To formulate and regulate the internal water resources policy in a way that guarantees their just distribution, and this shall be regulated by a law.”

It is explicitly stated in Article 115 of the constitution that in the case of disagreement between the federal and regional governments over water policies that the policies of any regional governments will take precedence. Furthermore, Article 121 states, “in case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.” Thus the constitutional provisions relating to water could potentially give rise to conflict. Regarding another natural resource, oil, it is clear that such conflicts already have arisen in a very protracted form.

We now turn to three examples of foreign investment and oil which have come into the public domain and which have until now received relatively little attention. Namely, the contracts between the Kurdistan Regional Government and the Norwegian oil company, DNO; with the Texas based oil firm, Hunt Oil; and thirdly with the world’s largest oil company, Exxon. We also consider the politics of pipelines and external actors. The attempt to develop federalism in Iraq is not being done on a blank canvas but in the context of the extreme artificial nature of the Iraqi state, war and occupation in which corruption flourishes, the latter being particularly germane in connection with natural resources. We will reflect on what these cases illustrate in terms of the debates over federalism and natural resources in Iraq.

## DNO, Peter Galbraith and Constitutional Negotiations

The first case study concerns a Norwegian oil company (DNO), the former US diplomat Peter Galbraith and his involvement in the negotiations of the Iraqi constitution. Reider Visser (this section is drawn from Visser 2009) has provided a detailed report based on a review of Galbraith's writing (Galbraith 2006) and the investigations of a Norwegian financial newspaper, *Dagens Næringsliv* (DN). Visser highlights the fact that whilst Galbraith was working as a constitutional adviser to the Kurds, he advanced a more "radical" version of federalism to the extent that he has been seen as an advocate of "soft partition" of Iraq. At the time Galbraith's advocacy was seen as being based on a principled espousal of the merits of federalism to address the woes of Iraq's deeply divided society on ethnic and sectarian lines. However, it transpires that Galbraith had a vested interest in the devolution of rights and powers to potential regions, as he had a stake in a company which would benefit from being able to conclude a deal with the Kurdish Regional Government.

The investigation of DN newspaper focused on the operations of DNO, scrutinizing aspects about share ownership and its contractual relationships concerning the Tawke field in the Dohuk governorate. DN tried to establish the identity of a third party which worked with DNO on the production sharing agreement (PSA) for Tawke 2004–2008. When this third party was removed when a new deal was signed in 2008, it led to a financial claim of about USD 500 million against DNO. The DN asserted that it had proof that one of the two mystery stakeholder claimants was Peter Galbraith who allegedly held a five percent share in the PSA for Tawke from June 2004 until 2008 through his Delaware-based company Porcupine along with a business partner from Yemen.

Visser contends that Galbraith mixed his roles in ways that constituted a conflict of interest which undermined his capacity to give independent advice on constitutional matters. In particular Galbraith's influence on the Kurdish leadership between 2003 and 2004 can be seen in the 2005 constitution's adoption of two key principles: "that residual powers belong to the provinces and not to the central government, as well as the supremacy accorded to local law over federal law," features which give the central government of Iraq fewer powers than many federations in the world:

... after I left Iraq in May 2003, I realised that the Kurdish leaders had a conceptual problem in planning for a federal Iraq. They were thinking in terms of a devolution of power—meaning that Baghdad grants them rights. I urged that the equation be reversed. In a memo I sent Barham (Salih) and Nechirvan (Barzani) in August, I drew a distinction between the previous autonomy proposals and federalism: 'Federalism is a "bottom-up system." The basic organising unit of the country is the province or state. The state or province is constituted first and then delegates certain powers (of its choice) to the central government ... in a federal system residual power lies with the federal

unit (i.e. state or province); under an autonomy system it rests with the central government. The central government has no ability to revoke a federal status or power' ... Finally I wrote ... 'any conflict between laws of Kurdistan and the laws or constitution of Iraq shall be decided in favour of the former. (Galbraith 2006: 160–61 cited in Visser 2009)

Visser highlights that Galbraith encouraged the Kurds to push their demands as far as they could. Galbraith worked on behalf of the Kurds in winter 2004 to help them table their demands and the Kurdish advances in the Transitional Administrative Law and also the 2005 constitution clearly reflects Galbraith's input. Galbraith writes,

On February 10 (2004) Nechirvan [Barzani] convened a meeting at the Kurdistan National Assembly of the top leaders of the PUK and KDP. I presented a draft of a 'Kurdistan chapter' to be included in the interim constitution [i.e. the TAL] ... Except for a few matters assigned to the federal government (notably foreign affairs), laws passed by the Kurdistan national assembly would be supreme within the region. The Kurdistan Regional Government could establish an armed force ... The Kurdistan Region would own its land, water, minerals and oil. Kurdistan would manage its future oil fields (and keep revenues) but the federal government in Baghdad would continue to manage all oil fields currently in commercial production. Because there were no commercial oil fields within Kurdistan as defined by the March 18, 2003 boundaries, this proposal had the effect of giving Kurdistan full control over its own oil ... The permanent constitution of Iraq would apply in Kurdistan only if it were approved by a majority of Kurdistan's voters. (1666–7)

The staging of the informal referendum on Kurdish independence is also claimed by Galbraith as a personal success.

Galbraith gives a further indication as to how influential he was up to the final hour of the constitutional process in 2005. On page 199, in a footnote, he writes,

A British treasury official serving as an advisor to his country's embassy nearly derailed the constitution two hours before the final deadline. He was reading an English translation being made as drafts of the Arabic text became available, and realised the federal government had no tax power. He was about to charge into a meeting of Iraq's political leaders when a quick-thinking Kurdish constitutional advisor grabbed an available Westerner—me—to explain the situation. The omission, I told him, was no mistake and he might want to consult with his ambassador before reopening an issue that could bring down Iraq's delicate compromise.

In August 2005 during the final negotiations, Galbraith was concerned about growing Islamic influences on the constitution and considered whether it needed

revising to strengthen the regions. At that point also Visser notes Galbraith wrote in the *New York Review of Books* emphasizing that the Kurdish leadership would accept the TAL's continuation as the Constitution if it could be made clear that they controlled the petroleum resources in the region and also the status of Kirkuk could be resolved. He also hoped that oil contracts made by the KRG could be left out of general federal control.

Visser notes that there have been many conspiracy theories concerning secret schemes to partition Iraq; while most of them are probably overstated this incident gives an indication of the way in which specific oil interests could favor a looser form of federalism or even Kurdish secession from Iraq. Visser argues that Galbraith's role as an advisor to the Kurds on federalism and advocate of policy options in Iraq were compromised by his allegedly 5 percent stake in an oil field whose development was directly related to the policy options he was trying to influence.

Under any circumstances, Visser argues this case could strengthen the tendency among Iraqis to be more critical about the details of the 2005 Constitution and not least the historical context in which it was conceived whereby the Sunnis were largely presented with a fait accompli by the Kurds and the Shia. One trend in Iraqi politics is the notion that this needs rectifying and there should be increased powers for the Baghdad federal government.

The population's main concern, manifested in demonstrations in Baghdad, Kirkuk, Erbil or Suleimaniah in spring 2011 is that better services of electricity and water be delivered, regardless as to whether it is a central or regional government doing it. As Reider Vissar notes "The test for all of Iraq's leaders going forward is whether they can do more than divvying up the spoils between themselves and actually deliver the services and jobs that the Iraqi people are asking for" (Visser 2011).

We turn now to the second case study, that of the Hunt Oil contract for the KRG, which sheds light in a different way, on issues concerning the federal system and the exploitation of oil resources in Iraq.

### Hunt Oil, the KRG and US Policy

The Hunt Oil is a small, privately owned oil company headquartered in Texas. It sees itself as going where the large majors will not. In the case of oil in the region controlled by the Kurdistan Regional Government whilst the political risk might be high it is outweighed by the very low technical risk (presentation by Hunt Oil to staff and students at the University Kurdistan Hawler, April 2009).

Information on the Hunt Oil contract is derived from the letters and emails provided by the Committee on Oversight and Government Reform of the House of Representatives, Congress of the United States (Congress of the United States, 2008). In a letter to the then US Secretary of State Condoleezza Rice the Chairman of the Committee, Henry A. Waxman noted:

The Hunt Oil contract with the Kurdistan Regional Government was controversial and complicated the efforts to enact a national oil law for Iraq. After it was announced in 2007 Administration officials expressed public concern and denied any knowledge or involvement. The President stated: “I know nothing about the deal.” A senior State Department official wrote the Committee that to the extent State Department officials were aware of the negotiations they sought to dissuade Hunt Oil from entering the contract because “signature of such contract would needlessly elevate tensions.

The documents made available by the Committee give a different account of the role of Administration officials. Ray Hunt, the head of Hunt Oil, personally informed advisors to President Bush of meetings he and other Hunt Oil officials planned with representatives of the Kurdish government. Other Hunt Oil officials informed State Department officials about the company’s intentions. An e-mail from Hunt’s Oil general manager states:

There was no communication to me or in my presence made by any of the 9 state department officials with whom I met ... that Hunt should not pursue our course of action leading to a contract. In fact there was ample opportunity to do so, but it did not happen.

A Commerce Department official who met with Hunt Oil representatives who planned their trip to Kurdistan offered them further support and wished them “a fruitful visit to Kurdistan.” Five days after the announcement of the Hunt Oil contract, a State Department official contacted Hunt Oil to describe another “good opportunity for Hunt” in Iraq, prompting a Hunt Oil official to write Ray Hunt: “This is really good for us ... I find it a huge compliment that he is ‘tipping’ us off about this ... This is a lucky break” (House Committee on Oversight and Government Reform, 2008).

Documents provided to the Oversight Committee show that Administration officials were aware well in advance about Hunt Oil’s interest in the Kurdistan Region, contradicting claims that Administration officials were caught off-guard and opposed Hunt Oil’s actions.

This case is interesting in terms of federalism because a key goal of official US policy has been to maintain the unity of Iraq under federalism: a nationally agreed hydro-carbons law was seen as a key pillar of this policy; the signing of agreements with the KRG before the signing of a national Iraqi law was seen as unhelpful to the development of such a law. A bureaucratic politics model would argue that potentially the left hand of the American government didn’t know what the right hand was doing, or more specifically that State officials on the ground acted in a way not consistent with official State Department policy. The Bush Administration policy of affirming the need for a passage of a national Iraqi hydrocarbon law certainly seems to have been disregarded by State Department officials in this case. Be that as it may, the Hunt Oil contract pales into insignificance when considered

against the implications of the signing of an oil contract with the KRG in 2012 by ExxonMobil, the largest oil company in the world.

### **The ExxonMobil Contract**

ExxonMobil announced in its annual report in March 2012 that it intended to explore for oil in the Kurdistan Region. It transpires that ExxonMobil signed contracts with the KRG Ministry of Natural Resources to search for oil in six blocks without reference to the central government in Baghdad (Kurdish Globe, 3 March 2012). These contracts included blocks in areas disputed by Erbil and Baghdad some of which could revert to Baghdad in any final territory demarcation agreement (Visser 2012).

For Masoud Barzani, President of the Kurdistan Region, the significance of the deal was more than economic:

When I went to the United States, [Exxon] wanted to see me, and I met the president of the company and other people and they said they are committed to [the contract] they signed with the Kurdistan region,” Barzani recalled. “If ExxonMobil came, it would be equal to 10 American military divisions. They will defend the area if their interests are there.

As the first contract signed with a major oil giant ExxonMobil’s venture into the Kurdistan Region had significant effects. While it incensed Baghdad and elevated tensions between Erbil and the federal government, it also made the Kurds more convinced that their approach to development of oil resources was the right one. Some of the area of the Exxon contract included territory outside the three KRG governorates including an area called Bashiqa in Ninawa, Mosul governorate. This allocation was also criticised by the Governor of Ninawa province and the provincial council voted for central government troops to be deployed to operations by ExxonMobil in these disputed areas (Altamimi 2012).

The central government of Iraq blacklisted international oil companies working in the Region and excluded ExxonMobil from a new round of bids for exploration contracts in the south and also threatened to terminate service contracts. In May the KRG Minister for Natural Resources, Ashti Hawrami, maintained that Exxon was still operating in the Region, in response to the assertions by the Iraqi Oil Minister, Abdul Kareem al Luaib, that the company had suspended its operations until the issues between Erbil and Baghdad were resolved (AK News, May 2012).

The US government’s official position was to support the federal Iraqi authorities. Following a meeting with Elizabeth Jones, US Assistant Secretary of State for Near Eastern Affairs, the Iraqi Prime Minister’s Office claimed the United States supported its position. Their statement maintained, “The United States has called on all the companies to (remember) the necessity to co-ordinate

with the central government before concluding any deal or contract, especially in the fields of oil and gas.”

A US State Department spokesperson clarified:

The USG (US government) has informed and will continue to inform US companies that signing contracts for oil exploration or production with any region of Iraq, without approval from federal Iraqi authorities, exposes these companies to potential legal risks. (Kami et al. 2012)

Exxon's status as the largest oil company in the world makes it a powerful player. It was the first major oil company with oil interests in Iraq (such as the massive West Qurna field in southern Iraq) to challenge Baghdad's authority and sign a deal with the KRG (Rasheed 2012b). It was followed in this move by other large oil companies such as Chevron, Total and Genel Energy (for list of Production Sharing Agreements see KRG Ministry of Natural Resources 2012). This was not surprising as Genel Energy's Chief Executive Tony Haywood pointed out: “arguably, it [Kurdistan] is the last big onshore ‘easy’ oilfield available for exploration by private companies anywhere in the world” (Wearden 2012).

Although Iraq's Deputy Prime Minister Hussein al-Shahristani threatened to evict Exxon from Iraq and replace it with Russian companies, it can be observed that perhaps this was more bravado and bluster. Many analysts believe the signing of the contract was a deliberate tactic by Exxon to play the competing factions in Iraq off against each other. Denise Natali observes that it may be a deliberate gamble by Exxon to leverage Baghdad through the KRG and in contrast to smaller oil companies Exxon's larger size gives it a longer time framework to negotiate (see Rozen 2012).

One attraction for international oil companies of signing deals in Iraqi Kurdistan is that it has a different approach to international investment than that which operates in Baghdad (Ciszuk 2012). The legal framework created by the KRG is relatively recent and designed to be attractive to international investors in order to develop the private sector, particularly in order to counteract the isolation of the region in the 1990s. In contrast, Baghdad's framework is a product of a centralized command economy model with little interaction with international business and a culture of slow moving bureaucracy. Whilst Iraqi Kurdistan has its own culture of bureaucracy the attempt to be business friendly means that having high level contacts can navigate business deals through any bureaucratic obstacles. In the case of the Exxon contract Baghdad's slow moving bureaucracy had significant implications: Baghdad owed ExxonMobil millions of dollars for its development of the West Qurna with payments not made because of the inefficiencies of Baghdad's bureaucracy. This was finally resolved in March 2012 when Baghdad agreed to pay in crude oil rather than cash (Altamimi 2012).

## **Regions, Governorates and an Iraq Oil Law**

It can be noted that a feature of Iraqi politics since 2005 has been the dispute over the nature of federalism and the possibility granted under the Constitution that any province could become a federal region with similar powers to the Kurdistan Region, currently the only federal region. This pertains to the question of whether Iraqi federalism should be defined as asymmetric federalism; more deeply it also reflects conflicts over the oil and gas resources. This issue came to prominence when in late 2011 the government of the central Iraqi state of Salahaddin declared that it aspired to be a semi-autonomous region of Iraq with similar financial and political autonomy as Iraqi Kurdistan. These moves were only symbolic—Iraqi provinces require a public referendum and parliamentary approval; furthermore, the Iraqi Prime Minister was critical of the idea. This was followed by other parts of Iraq to attain administrative and financial autonomy such as Anbar and Basra.

Arguably the province that has the greatest possibility of upsetting the federal relationships is that of Kirkuk. Kirkuk contains communities of Kurds, Arabs, Turkomen and a smaller population of Assyrian Christians. It was subject to a policy of Arabization under the regime of Saddam Hussein. Under the current Iraqi constitution (Article 140), a policy of population normalization should be undertaken followed by a referendum to decide on the status of the city: whether it becomes part of the area governed by the Kurdistan Regional Government or part of the rest of Iraq. Compounding these demographic issues is the existence of the Kirkuk super dome oil field. Kirkuk city and province contains 12 percent of Iraq's oil reserves, that is 15 billion barrels of Iraq's proven reserves of 115 barrels (Hanauer and Miller 2012: 10).

It is argued that all moves and counter moves over regional and provincial status largely boil down to disputes over its oil and gas resources, real or potential, and the control thereof. The long running dispute over oil exports between the KRG and the central government exemplifies the tensions over the control of natural resources in this uneasy federal union. The KRG first stopped its oil production in April 2012 in protest at the non-payment by the central government of oil companies operating in the Kurdistan Region but then subsequently restarted it at the beginning of August. At the end of August the KRG threatened to again stop its share of agreed national oil exports. The Baghdad government responded that it would deduct monies from the KRG's share of the national budget in proportion to the revenue lost in exports. Iraq was gradually ramping up its oil exports moving beyond the 3 million bpd for the first time in over 30 years and overtaking Iran to become the second largest oil exporter in OPEC after Saudi Arabia (Rasheed 2012a).

Despite this boost in their exports by November 2012 Iraq still lacked a national oil and gas law, a situation that had persisted since 2007 when the first draft law was discussed. Denise Natali (2012b) observes that both Baghdad and Erbil have benefitted from the absence of a law “at least in the medium term” and argues that:

Legal and political ambiguity has allowed both sides to postpone key decisions on key issues, consolidate power and leverage and profit financially from undisclosed revenues and ongoing investment. Instead of the negotiation of an oil law, what is more likely is a continuation of the status quo, at least until international oil company payments come due or a game changing event demands a compromise.

In order to coherently develop the oil industry in Iraq an oil law is required to replace the confusing mix of Saddam era legislation, the 2005 constitutional provisions and the KRG's oil and gas law (Natali 2012c). Both Baghdad and Erbil have been able to advance their interests and make profitable deals in the current stalemate. Despite the signing of contracts by international oil companies with the KRG, Baghdad is developing agreements with national oil companies to exploit its oil resources. Instead of making concessions to enact a national law, Prime Minister Nouri al-Maliki has focused on measures to win the support of key oil provinces such as Basra. In the same way, the lack of an Iraqi oil law has not held back the development of the Kurdish energy sector. The KRG issued its own oil law in 2007 and has successfully defied Baghdad's warnings to blacklist oil companies signing deals with the Kurdistan administration and has even used Baghdad's non-payment to progress the KRG strategy of replacing smaller oil companies with large majors who can represent KRG oil interests in the region and globally. Corporate mergers and purchase of companies have brought financial reward to the KRG and its associated network of companies and individuals. This financial reward for the KRG has been obtained without an Iraq hydrocarbon law; furthermore, the potential three year delay between signing of contracts and commencement of drilling and associated payment deadlines gives the KRG more time to progress its strategy to pressure Baghdad and come to an agreement with Turkey for oil exports.

A key question in relation to the paradox of federalism is whether the export of Kurdish crude in 2012 and the presence in the Kurdistan Region of major oil companies signify an increased likelihood of the attainment of a Kurdish independent state? The situation in Syria has also been seen as potentially leading to an autonomous Kurdish region there, which could merge into a greater Kurdish state with access to the sea. Access to the sea would at a stroke remove the issue which has largely framed many aspects of the question of Kurdistan: its landlocked geographical position. With regards to natural resources this has been reflected in its dependence on pipelines transiting neighboring hostile states. Natali (2012b) argues persuasively that even with the activities of larger international oil companies in the Kurdish north, given regional geopolitics and matters of security, Kurdish statehood is still "highly unlikely."

Natali notes that the fact that large oil companies are operating in the Kurdistan Region is an achievement for the KRG but in itself is not that surprising. Mergers and acquisitions have been necessary to offset costs particularly as many of the companies are yet to receive payment. The KRG has offered generous profit

sharing contracts (PSCs) which contrast with the less lucrative technical contracts offered by Baghdad.

In these circumstances many larger international oil companies have found the prospects in Kurdistan attractive. Natali contends this should not be misconstrued as giving international oil companies a role as a mid-wife of Kurdish statehood which will be more likely determined by regional states such as Turkey. Whilst the political and economic relations between Ankara and Erbil have improved, there is the long-running PKK problem which has been intensified by the Syrian situation, which has increased Turkey's concern about the potential emergence of three neighbouring Kurdish autonomous regions.

This is compounded by developments in Iraq in the energy sector. Natali argues that the KRG's rapid expansion of its energy sector has intersected with the KRG's maximalist territorial ambitions and strengthened Iraqi nationalism. Iraqi Sunni groups have reacted to Kurdish demands and moved closer to Iraqi Prime Minister Nouri Maliki instead of creating a regional Sunni Muslim alliance as might have been hoped for by Ankara. Added to this are polarizing trends within the Kurdistan Region in which there has been an agglomeration of power by the Barzani-Kurdistan Democratic Party sustained by its control of most oil contracts at the Habur crossing of the Iraqi-Turkish border. In a situation resembling the mid-1990s the Patriotic Union of Kurdistan headed up by Iraqi President Jalal Talabani and the breakaway Goran (Change) movement have sought to counteract the revenues of the Ankara-Erbil alliance by enhancing their relationship with Iran. They oppose Barzani's approach to Baghdad and KDP involvement in Syria Kurdistan and have taken their lead from Iran's insistence that they do not become involved in Syria. These internal Kurdish divisions also complicate discussions in the Iraqi parliament on oil payments, creating further delay in agreeing a scheme to allow Erbil to receive payment for oil.

Natali submits that given these dynamics, instead of an accelerating transition to a Kurdish state, what is more likely is "ongoing political limbo" in which the various Iraqi and regional party figures will seek to maximize their gain from oil deals in an ambiguous legal and political framework before coming to a mutually beneficial final arrangement if circumstances allow. Furthermore, Natali (2012a) notes that after the US withdrawal from Iraq, Iraqi Kurdish leaders were seeking the codification of a "special relationship" with the United States, a move supported by some in the circles of power in Washington. Natali argues that such a move would be unhelpful in bringing about accommodation in Iraq, noting that the Constitution already weakened the central government and awarded many powers to the Region. The United States helped the Kurds achieve the largest gains in the post-Saddam environment. In contrast to other federal systems the KRG receives its revenue—17 percent of the Iraqi budget—but does not make transfer payments to the central government. It does not make public the revenues it receives from customs or register complete documentation to Baghdad for official oil export payments. Furthermore, it allows oil smuggling to Iran which goes unsanctioned by the United States. However, as Baghdad has often not paid

the Region for the oil it exports this is a driver for oil smuggling. This was done by truck but the construction of oil pipelines would bring oil exports from Kurdistan to another level.

## **The KRG, Turkey and the Politics of Pipelines**

A key point that can be drawn from these case studies of the issuing of oil contracts by the KRG is that the constitutional provisions relating to the federal project supported by the United States are seen on the ground as the new rules in an old game in which different groups vie for power in Iraq. The post-cold-war changed political space has given Kurds a greater opportunity to play the game of international politics: to lobby in significant capitals of the world, and oil gives them something with which they can increase the number of companies and states which have a vested interest in an autonomous Kurdistan Region (conversation with security professional, Erbil, June 2011). The KRG accepts the federalization of natural resources on a surface level, as it sends revenues to Baghdad. But underneath this there is another game being played in the geopolitics of the region. The Kurdistan Regional Government is creating a mutual dependence between it and its previously hostile neighbor Turkey. The Kurdistan Region is conducting an 8 billion trade with Turkey and the Kurdistan Region supplies oil under the table to Turkey at low or no cost (conversation with oil professional, Erbil, June 2011) and members of the KDP elite have personally invested \$4 billion of their fortune in Turkey. All this has smoothed the Turkish-KRG relationship over the last two years culminating in visits by Masoud Barzani to Istanbul and more recently to Diyarbakir and Recep Erdogan to Erbil.

The appointment of Sinan Celebi of the Iraqi Turkman community, as the KRG Minister for Trade and Investment was a mutually agreeable appointment for both Erbil and Istanbul. Through these improved relations with Turkey the Kurdistan Region of Iraq has been able to diminish the degree to which it is surrounded by hostile states. Related to this regional geopolitics, is the possibility of the Nabucco pipeline filled with Kurdish gas from potentially one of the largest gas fields in the world, supplying Europe with gas via Turkey. This would ease Europe's dependence on Russian gas and accompanying vulnerability to Russian coercion which had been exercised in the case of Ukraine (conversation with oil professional, Erbil, June 2011).

In May 2012 Turkey signed a deal to build a new oil and gas pipeline from Kurdistan without the approval of the central government in Baghdad (Dombey 2012). With the potential to deliver 1 million barrels per day, the pipeline could give Turkey direct access to oil from the Kurdistan Region (such as the Tak Tak oilfield) avoiding transit areas controlled by the Baghdad government and open up the Kurdistan Region to external markets. Baghdad warned Turkey that it needs Baghdad's clearance to construct new pipelines carrying oil and gas from the Kurdistan Region.

This plan included proposals to link the Taq Taq oil field to the Kirkuk-Ceyhan pipeline to Turkey. Perhaps more significantly was the announcement of intentions to build a separate pipeline by 2014 that would link up with Ceyhan which would diminish the Kurdistan region's dependence on Baghdad by bringing key oil export and import infrastructure within its own territory (Ismaeel 2012). However, even before the start of the construction of this pipeline, export of oil products to Turkey from Kurdistan was taking place by truck over the border (Gosden 2012). The oil product involved was light crude. Furthermore, the Kurdistan Region's involvement of two of the world's leading trading houses (Trafigura and Vitol) in this arrangement made it more difficult for Baghdad to take punitive counter-measures as a boycott of these firms by the federal government would increase its costs. Trafigura received the first shipment in October 2012 by the intermediary Powertrans. Vitol followed next, taking a 12,000 tonne consignment which at \$890 per tonne was worth \$10 million. The export was expected to grow to 1200 tonnes per day and more trucking capacity would be available by the end of the year. Baghdad maintained that the exports were illegal (Financial Times-Reuters 2012). Countering this, the KRG Minister for Natural Resources Ashti Hawrami maintained that crude oil exported from the Kurdish region would still be Iraqi oil and that the KRG would deduct 17 percent of the revenue in line with the Iraqi Constitution and transfer the rest to the Iraqi Central Bank.

As has been seen it has not been possible to pass a new law at the federal level as envisaged in the constitution which would govern new oil and gas developments. As a result the Kurdistan Region passed its own oil and gas law in 2007 which was declared illegal by the central government. At the heart of the matter is trust or its absence, between the different parties. As Shwan Zulal notes:

The main issue in all of this is trust. Or, at least, the distinct lack of it ... The Kurdish demands are clear: they want a decentralised oil industry within a federal Iraq. And the views of the federal government, headed by al-Maliki and represented by the Deputy Prime Minister for Energy Hussain al-Shahristani, are also clear: a centralised oil sector with the central government more powerful in related decisions. Iraq's federal government keeps trying to centralise power but Iraqi Kurdistan, which has been semi-independent for over 20 years, will not play along. (Zulal 2011)

The lack of political trust in the relationship between Erbil and Baghdad is characterized by grand-standing and brinksmanship and actions and punitive counter actions with very little in the way of confidence building measures as is demonstrated by the intermittent halting of oil exports.

## **Halting of Oil Exports**

In April 2012 the Kurdistan Regional Government halted oil exports from its own fields to Baghdad until further notice. That was due to non-payment by Baghdad since May 2011 to companies producing oil in the Kurdistan Region. The KRG Minister of Oil and Natural Resources, Ashti Hawrami, indicated that export would continue when Baghdad resolved the non-payment issue (Keyee 2012). Hussein al-Shahristani, a former Baghdad oil minister, observed that Kurdistan was given 17 percent of the federal budget of Iraq and yet it pumped a smaller amount of oil exports. All of these oil and gas deals give the possibility of personal enrichment to the government officials involved regardless of whether they are in the Kurdistan Regional Government or the federal government in Baghdad. However these elites have come under increased pressure by the demonstrations of the population in Spring 2011 who demanded that their elected government provide better basic services such as electricity and water with the oil revenues rather than merely enrich themselves.

The chapter now turns to consider issues of elite maintenance and conflict over natural resources which explain some of the underlying dynamics over the issues which have been so far reviewed: signing of oil contracts, oil smuggling and exports, and passage of an Iraq oil law. This perspective significantly enhances understanding of Iraqi federalism and the place of the Kurdistan region within it.

## ***Wasta, Corruption and Elite Conflict over Natural Resources***

Connections are important all over the world, although in countries such as the UK and USA there is rule of law including equal opportunities legislation, and a somewhat independent judiciary, with a variety of media capable of investigating abuses. *Wasta* is an Arabic word which means connections; to have *wasta* means to be well connected and to be able to use those connections to achieve access to useful resources—employment, government office and business deals. Perhaps in places such as the USA whilst being known and having connections is an advantage, in the end you have to be qualified and able to do the job. In Iraq in contrast, there is ample evidence that a significant determinant of securing a job is having *wasta*, and indeed an ability to do the job may be a secondary characteristic. Whilst there may be official regulations and procedures, the unofficial law of *wasta*, may cut across all this and trump qualifications and ability. Iraq is one of the most corrupt countries in the world (Transparency International 2012) and the Kurdistan Region shares this characteristic. There are difficulties in researching corruption as much is never more than word of mouth or hearsay. Possession and control of territory and associated government office enable an individual and his family to benefit financially. All of this may take place through some arm's length mechanism: a payment to a lawyer for example. Another example is a government contract is allocated with a certain amount of government expenditure. This

contract is given to a family relative who sells on the contract with less money pocketing the difference. The result is that the contract is undertaken without the resources which have been assessed as necessary for its completion. The result is a sub-standard project when completed, if completed.

It is possible to talk about the Erbil area having “positive corruption”—there was corruption but because political authority in the Erbil region under the KDP was more centralized the project would be completed in the end. In contrast, in the Sulamaniah area where the less centralized structures of the PUK prevailed there was “negative corruption”: there were so many individuals top-slicing projects with less oversight, that many projects would never see any kind of completion and hence there was less development there, explaining in part the success of a political challenger there, the Goran movement (discussion with Denise Natali, Erbil, 2009).

The political parties of the KDP and the PUK operate as networks of patronage which greatly influences the allocation of valuable resources such as government jobs. Furthermore at the center of these political parties and networks are the Barzani and Talabani families. These political parties mobilize support for the respective parties during election campaigns, which are, to a greater or lesser extent, free and fair. This system of “trickle down benefits” maintains some kind of social and political stability to some degree, but events in Kurdistan in 2011 and 2012 suggest that this stability may be rather superficial.

### **“Dynastic Republicanism” and the Kurdistan Region of Iraq**

Before the “Middle Eastern Spring,” Larbi Sadiki (2009) provided an insightful analysis into the recurrent pattern of politics in many Middle Eastern states: dynastic republicanism. Referring to the states of Tunisia, Egypt, Libya and Syria, he noted how these putative republics were ruled by families who seemed intent on grooming their sons or close relatives to succeed by offering them as candidates at the ballot box in elections. In much of the Middle East, the state is a superficial construct imposed by Western powers, and loyalty and trust are given to the family, tribe and sect primarily. State structures are an arena for competition which rival networks of patronage seek to capture. An example of this is Saddam Hussein’s regime encompassed concentric circles of trust, the closest which ultimately rested on the Takrit clan from the town of his birth. In the current Iraq government structures, a ministry will be controlled by a political party which will dispense jobs within its patronage network, and control of ministries will be part of the horse-trading that takes place after an election.

In Tunisia, Egypt and Libya the dynasties of Ben Ali, Mubarak and Ghaddafi have been swept away by protest and new elites will form, quite likely, engage in similar systems of *wasta* and patronage. Similarly, in the Kurdistan Region, we can still observe that a form of dynastic republicanism operates (see also Owtram 2012). The current President Masoud Barzani is the son of Mullah Mustafa

Barzani, the legendary Kurdish resistance leader. His son Masrur Barzani is the head of the Kurdistan security service. Masoud Barzani's nephew, Necherwan, is the deputy head of the KDP and was Prime Minister of the KRG 2006 and again in 2012. The son of Jalal Talabani, Qubad Talabani, is the KRG representative to the United States. It can be noted that in the USA political dynasties exist: the Kennedys and the Bush family for example. On the one hand, it could be argued that a familiarity with the ways of power allow these individuals to do these jobs well whilst on the other hand, it can be seen as an example of entrenched family networks. It can be asked whether a similar scenario will develop in the Kurdistan Region of Iraq as happened in Egypt and Tunisia.

In 2011 demonstrations broke out in Sulamaniah in the Kurdish case of the Middle Eastern Spring, reflecting demonstrations also taking place in Baghdad, Basra and other parts of Iraq. In some sense Iraq had a form of democracy that was delivering free and fair elections at the ballot box. What these demonstrators were demanding was that their elected representatives delivered improvements in their quality of life in the form of basic services of electricity and water supply, rather than lining their pockets with the trappings of office based on control of oil revenues. In Sulamaniah, the disgruntled population vented its ire on the office of the KDP. Rock throwing and an attempt to storm the building was met with live ammunition fire from the guards and the deaths of a number of youths. In Erbil the KDP was determined not to allow anything similar to happen and a lock-down of the city was instigated. These protests challenge the elite of the Kurdistan Region, as it did the other elites in Iraq, to use hydrocarbon revenue to deliver services and benefits to the general population.

### **Sectarian Strife and Natural Resources: an Asymmetric Solution?**

A key question in terms of federalism and natural resources is whether the different political elites in Iraq can compromise sufficiently to negotiate such deals as an Iraq oil law. However, this would require the country not to slide back into the state of near civil war which held sway in 2006 to 2007, something which the issue of the arrest and trial of the most senior Sunni politician in the Iraqi government had the potential to do. Just as the last US troops had left the country, the Baghdad government issued an arrest warrant for Tariq al-Hashemi, a Vice President of Iraq and the most senior Sunni politician in Iraq, on charges of organizing death squads.

Al Hashemi fled to the Kurdistan region and thence to Qatar and subsequently Turkey. He was tried in absentia and sentenced to death. He characterized the trial and judgment as politically motivated; the Turkish Prime Minister Tayyip Erdogan informed that al-Hashemi would not be returned to Iraq (BBC 2012). The trial and judgment has further increased the sectarian tensions and threatens to push Iraq back to the near sectarian civil war of 2006–7. It also affected the federal relationship, as the fugitive had found refuge in Iraqi Kurdistan first; al-Maliki warned of “problems” if al-Hashemi was not handed over for trial but KRG

President Masoud Barzani explained that “Kurdish ethics” would not allow this (Aqrabi 2012). In the end the “problem” resolved itself in that al-Hashemi moved on to firstly Qatar and then Istanbul.

The 2013 Iraqi budget gives a further example of the problem involved in developing the central-regional relationship and possible sectarian ramifications. Oil is exported through a pipeline controlled by the federal government and according to Iraq’s revenue sharing scheme over 80 percent of the proceeds from international oil sales goes to Baghdad with 17 percent allocated to the Kurdistan Region (Atkinson 2013). Following a change in the way in which the central government works out payments to oil companies, Kurdistan stated it had not received sufficient finance to pay the oil companies. Each region can keep \$1 per barrel of oil produced and it transpired there was a mismatch between the figures supplied by the KRG for the number of barrels claimed and the number apparently produced. This led Baghdad to cut the money it transferred to the Kurdistan Region and Iraq’s delayed 2013 budget was passed without the approval of Kurdish politicians. Although the KRG requested \$3.5 billion dollars be set aside for payment of oil companies operating in the Region only \$650 was allocated.

Genel Energy, for example, has not been paid because of the dispute between Erbil and Baghdad (Atkinson 2013) and as a result has had to stop exporting oil since December 2012. It is currently producing for the domestic market at a rate of 80,000–100,000 bpd. This level of production is still considered sufficient to develop a growing business but if it becomes possible to export through pipelines it could increase its production to 150,000 bpd. Turkey is involved with schemes to build a pipeline which will allow Kurdish gas to be exported into Turkey and the EU by 2014 independent of the Baghdad controlled network. Furthermore, despite the dispute between Baghdad and Erbil, oil companies are keen to expand their activities in the Kurdistan Region, including supermajors such as Exxon, Total and Chevron, as it is seen as one of the last frontiers of easy oil exploration in technical terms. Indeed, the KRG has used this as an opportunity to replace medium sized IOCs with larger IOCs which will give it more leverage in its negotiations with Baghdad. Ever since the 2003 the Kurdish-Shi'a alliance has formed the bedrock of post-Saddam politics in Iraq. However, with KRG concerns over the centralizing tendencies of Maliki and Iranian influence in Baghdad, the relationship with Turkey is increasingly attractive to Erbil. As such it places Erbil and its alignment with Ankara at the opposite end to Baghdad of a burgeoning sectarian polarization in the Middle East (Idiz 2013).

This further illustrates the challenges that the different political elites in Iraq will have of negotiating compromises necessary to achieve resolution of political disputes in the longer term, the toughest of which will be over natural resources. As Joost Hilterman et al. note “Oil has been at the heart of the federalism dispute from the beginning” (Hiltermann et al. 2012: 9). In their analysis they note that the 2005 constitutional provisions resemble very much a “coming together federalism” in which the Constitution allows in theory any province to acquire the same autonomy as the Kurdistan Region, presently the only federal region. At the

heart of the matter was the potential extension of the autonomy developed in the Kurdistan Region since 1991 to the rest of the Iraqi provinces, a problem they feel could be overcome by a move to an asymmetrical model of federalism in which the rights accorded to the Kurdistan Region were recognized as unique. Key to this is a deal over the energy sector for which Hiltermann et al. (2012) outline a possible resolution aimed at boosting confidence between Baghdad and Erbil and lay the foundations of an asymmetrical federal system which would possess greater stability. This would involve the KRG being guaranteed automatically a share of oil revenues, rights to sign oil contracts and allowed to use oil and gas infrastructure as part of a longer term move to self-governance. Currently, the KRGs operational funding is subject to Baghdad's yearly budget setting process. The central government's supreme role in oil revenue handling and formulating national oil and gas regulations would be recognized by the KRG. Simultaneously the Kurdish leaders would need to refrain from blocking attempts by the central government to consolidate its oil and fiscal powers outside of Kurdistan. The KRG has sought to protect its share of Iraq's oil revenues and has much to gain from maintaining this as over the next decades the expansion of Iraq's oil revenues from southern fields tops even the most optimistic projections for Kurdistan's oil and gas. Hiltermann et al. (2012) note the durability of the post-Ottoman state system in the Middle East and suggest that given the regional geopolitical constraints there may be an opportunity in the future to negotiate some modifications to the current federal system.

## **Conclusion**

The ship of a completely centralized Iraqi state has sailed and is no longer a realistic possibility or a normatively desirable outcome. All that remains is to see whether a better state vessel can now be fashioned to a different design from the wreckage and debris washed up after decades of war and conflict. From this review of federalism and natural resources it has been seen that out of the particular circumstances surrounding the negotiation of the 2005 Constitution a good deal of ambiguity was created relating to the provisions for federalization of natural resources.

In a situation of political stalemate, elites in all regions, sects and political parties have been able to secure financial gain for themselves and accordingly no Iraq oil law has been passed in the Iraqi parliament. The prospects then are that Iraq will continue for the foreseeable future as a "fragmented state" in the words of Herring (Herring 2009: 182–7) contained for the time being within the federal system laid down in 2005.

In this framework the Kurdistan Region will continue to develop more coherently as an autonomous region and the central Iraq government in Baghdad will be supported by revenue from oil. The coalescence of interest of global oil companies, corrupt ministries and neighboring countries will maintain the current framework of the Iraqi state. The factor of corruption in the shadow or

covert economy should also be taken into account. Underneath the facade of a functioning government apparatus the distribution of oil revenues will be drawn upon in the form of embedded corruption by the various groups that control the different structures of government apparatus.

In the framework of such state and governmental structures, low level ethno-sectarian conflict will continue. A contention is that the Iraqi state conceived as a British creation to facilitate the exploitation of oil has certain limitations of malleability. After over three decades of regional war, genocide, sanctions and vicious sectarian conflict, there are many obstacles to overcome for the communities to resolve their differences when it comes to hard decisions of political and economic interest. It is a human tragedy that whilst all communities in Iraq were able to come together to celebrate the triumph of the Iraqi football team in the Asian championship 2007 it is so much more difficult when it comes to economic and political matters. While it is not to gainsay other possibilities the authoritarian and genocidal Ba'thist state, which launched two wars in the space of 10 years, was arguably the inevitable outcome of an integrationist concept of the Iraqi state. A process of secularization in which religiously-based communal identity lost its force would allow Iraq to function better but in the contemporary Middle East this is extremely unlikely as the reverse is the case: religious identity is increasingly significant and so far this has been accentuated in electoral results in Tunisia and Egypt following the revolutions of the Arab spring.

In connection with the paradox of federalism this chapter finds that in the short to medium term the current federal system provides the different political elites a framework within which they benefit from a political stalemate which enables them to develop their financial interests. In the longer term a deal will need to be done to resolve key issues, possibly in a form of asymmetrical federalism. The federalization of natural resources will be one of the toughest areas to negotiate but regional geopolitics and the Kurdistan Region's dependence on the central government for its revenue will likely maintain the Kurdistan Region's place in a federal Iraq.

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# Chapter 6

## Combining Islam and Democracy in a Federal Constitutional System

In the name of God, the most gracious the most merciful<sup>1</sup>

In the name of the People ...

### The Problem Under Study

The introduction of an ethno federation in the Middle East is a rather daring constitutional innovation in the region, which is predominantly Muslim, while contemporary federalism that recognizes and institutionalizes differences is an essentially Christian idea. Federal design can be successfully implemented only through a Meta Law, as federalism is impossible without a written constitution and a constitutional court that interprets and enforces constitutionally established federalism, regulates the federal relationship and umpires differences between various interacting levels of government.

The Iraqi constitutional system has incorporated two Meta Laws by making Islam and principles of democracy the foundation for legislation. Obviously, this mix of contradictory principles in the fundamental law of the land may have a direct bearing on Iraqi federalism, as any piece of legislation enacted, say by the Kurdish parliament, has to simultaneously meet the principles of both Islamic and liberal Meta Laws. The Federal Supreme Court will necessarily have to choose during constitutional adjudication which set of principles to uphold, as it is impossible for legislation to be simultaneously in harmony with both the Islamic and democratic principles of the federal constitution. Therefore, an activist Supreme Court can choose to strike laws as unconstitutional at will, and damage the brittle nature of Iraqi federal relations.

The new Iraqi constitution is a result of concessions and difficult compromises made by heterogeneous actors at a time when the divide between the main ethno-religious communities seemed unbridgeable. On the other hand, the resulting incompatibilities of the foundational principles may undermine in the long run the original intent. Constitutional design matters a lot for the viability of a federal system and failed federal projects have been all the results of a poor constitution.

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<sup>1</sup> Typically, all official documents in Iraq begin with this formula, including the 2005 Iraqi Constitution whose first sentence is “In the Name of God ... ” Many new legislative acts, however, are prefaced by a different motto: “In the Name of the People,” which implies the idea of popular sovereignty alongside divine sovereignty.

In democracies, liberal democracies in particular, constitutions have two broad objectives and ensuing functions: (1) establishing self-governance through majoritarian decision making and (2) shielding individuals and minorities from possible abuse of majoritarian rule. Reconciling representative democracy with the protection of minority rights is hard to achieve even in countries with long democratic traditions, let alone in an aspiring democracy.

When elites in non-Western countries attempt to reproduce the liberal democratic model in their political systems, they typically succeed in bringing Western institutions and even some procedures, but almost always fail to replicate the balanced relationship between the institutions; the judiciary characteristically being the weakest element of the borrowed institutional setup. Most constitutions in the developing world contain a liberal Bill of Rights, yet its enforcement is generally weak, both because the Bill of Rights brings concepts and relationships alien to indigenous cultures and because the judiciary is typically weak and subservient. In most political systems with constitutional transplants, judicial power and, consequently, judicial enforcement through judicial review have proved ineffective. If the liberal Bill of Rights is complemented by the Islamic principles of Shari'a, both embedded in the same constitution, the situation becomes significantly more intricate.

The problem this chapter addresses is rather peculiar and relatively new in constitutional law. It relates to the attempts made in several countries to combine liberal constitutional principles with conservative religious precepts. This has become an increasingly common phenomenon in countries where regime change and democratization have been internationally assisted. Today there are over two dozen states whose constitutional principles stem directly from Islam. Several of them add liberalism to their constitutions, like Pakistan, Afghanistan and Iraq, in an attempt to "reconcile the principles of Islam with those of Enlightenment" (Cole 2005). With the Arab Spring and new developments in the region, others are likely to join the club.

Many scholars claim that the principles of Islam and liberal democracy are totally incompatible (Huntington), while others disagree (Fukuyama 2001, Ibrahim 2006; Diamond 2010). No doubt that on an abstract philosophical level, the sense of justice and fairness seems to be understood rather similarly in both Western and Islamic tradition. But when these traditions are codified and embedded in a modern constitutional system, their incongruity becomes salient, laden with implications both for the state foundations and daily politics and life.

Most of the controversies arise from the claim by Islam that it has definite answers to acute moral and ethical dilemmas which both philosophers and law makers in the West are still wrestling with, such as death penalty, women's rights, civil liberties, the role of the state and its welfare obligations. The scope of the differences is not easily grasped because some Islamic percepts may appear in the eyes of Western scholars insignificant or peripheral to constitutionalism while in fact they are central and consequential.

Today, there are almost two billion Muslims across the globe and these new developments may affect the conditions of liberty, equality, human rights and democracy in the entire world. It is highly interesting to see how Islam may affect the public sphere when it is constitutionally mandated as official religion alongside liberal democracy. The result of this constitutional engineering is the existence of more than one Meta law in one constitutional system. Consequently, such a political regime is left with difficult choices to make during constitutional adjudications.

According to Article 2 of the Iraqi Constitution, Islam is the official religion of the state and is the primary source of legislation:

- a. No law may be enacted that contradicts the established provisions of Islam.
- b. No law may be enacted that contradicts the principles of democracy.
- c. No law may be enacted that contradicts the rights and basic freedoms.

This provision makes indeed an explosive constitutional cocktail, as Islam has its own immovable constitution spelled out in the Holy Book of Quran, which does not always square well with liberal principles, as defined in the Bill of Rights. Another unexpected dimension of the incorporation of Islam into the constitutional system is that the Shi'a in Iraq form a stable majority and can pass laws that might challenge Sunni interpretation of the Quran, fueling the already tense relationship between the two sects. The ideological differences between Shi'a and Sunnis have posed enormous challenges to the constitutional order in Iraq, compounded by ethnic tensions and territorial disputes.

More specifically, the problem under study is the cohabitation of Islam and a liberal constitutional regime in one political system and a possible impact of this dual Meta law on Iraqi federalism. Our main argument is that the combination of Islam as Iraq's official religion with democratic constitutional principles has not noticeably affected the Iraqi federal system so far, as these two sets of principles remain in fact declarative and unenforceable. The incongruity of the foundational principles has not been brought to bear on the federal relations as yet because the Iraqi Federal Supreme Court eschews cases that arise from the fundamental contradictions of Article 2.

The logic behind this argument is as follows: the Iraqi constitution has assumed conflicting obligations. Consequently, any of the most mundane pieces of legislation may come into collision with either the Islamic or liberal Meta law. Therefore, a prudent Federal Supreme Court keeps a low profile in constitutional adjudication involving the Article 2 area. One can easily foresee though that given strong Islamic traditions in Iraq, and the stable, if not permanent, Shi'a majority in the parliament, this situation may not last for very long; the anomalous combination of religious principles with liberal constitutionalism in one political system is likely to lead to a situation where liberal rights, including federalism, may be sacrificed.

## **Explanatory Framework**

The compatibility of democracy and Islam has been hotly discussed in the literature. The key word of liberal democracy is constitutionalism understood as protection of individuals and constraints on government. But beyond the West, there are other constitutional systems based on other principles of societal organization. Polities, often under permanent external threats, have worked out different foundational principles that have allowed them to survive through history and preserve their identities. Concerns over the protection of individuals and minorities from “the tyranny of the majority” constitute a distinguishing feature of the Anglo-Saxon protestant civilization. In general, individualism as a unifying principle of society is not celebrated or even accepted elsewhere. Self-sacrifice, valor and heroic action in the interests of the community are held in the highest regard in most places of the global village even today, from Confucianism to Hinduism, from Russian Orthodoxy to African tribes. Individuals organize into polity specifically to seek security, stability and prosperity; in these circumstances, pursuing individual happiness may look like free riding, which is also reprehensible even within the Anglo-Saxon liberal paradigm.

Liberal constitutionalism did not come from Heaven; it has resulted from the evolution of Western society and as such is culture-bound and religiously influenced. A recent article *The Missionary Roots of Liberal Democracy* specifically demonstrates how Protestantism has led to the emergence of liberal democracy (Woodberry 2012). Woodberry argues that “Western modernity, in its current form, is profoundly shaped by religious factors … ” (Woodberry 2012: 244). “What we consider modernity was not the inevitable result of economic development, urbanization, industrialization, secularization, or the Enlightenment, but a far more contingent process profoundly shaped by activist religion” (Woodberry 2012: 270). Therefore, it would be logical to admit that other types of constitutionalism could exist shaped by other cultural and religious circumstances. Professor Gould admits that, “The regulation of political activities by Shari'a might entail different forms of ‘constitutionalism’ than the one found in the West” (Gould 2011: 2). With ongoing globalization and the triumph of liberalism, these two worldviews have been brought into close contact, and attempts have been made to combine them using the best of both worlds.

### *Constitutional Theocracy vs. Liberal Constitutionalism*

Western constitutionalism is a political doctrine that claims that in the public domain, authority should be institutionalized and limited, while in the realm of private life, people should be left alone (Lane 1996: 19). Islamic constitutionalism seems to stand for the exact opposite in that respect. Islam does not distinguish between political community and religious society. Islam requires and regulates participation in public life. In fact, Islam is as much a private as public matter: Shari'a goes into detail explaining how one should maintain daily hygiene, have

sex with the spouse on the one hand, and how justice should be served in society on the other. One can say that Islam is not only a political religion, but a way of life in general.

The scope of religious practice in Islam and Christianity is different. In the West, religion is understood as “the belief in worship of a god or gods, or any such system of belief and worship” (Cambridge Dictionary 2003). The key term in this definition is worshiping; in other words, religion is about worshiping God. *Din*, the Arabic word for religion, means something quite different. Islam is a way of life for Muslims, while worshiping is only one of four aspects of the religion. Islam incorporates *Aqidah* (beliefs), *Ibadah* (worshiping), *Mu'amalat* (dealings) and *Akhlaqiat* (moral principles) (Omar 2004). Accordingly, the English word “religion” refers to Christianity and does not fully cover Islam.

The profound meaning of Islam is “submission to Allah.” Hudson notes that the main issue of Islamic legal and political thought is that Islam “recognizes god as the single sovereign” while the state is not recognized as an “independent object of allegiance” (Hudson 2008: 2–5). The Islamic vision of God as an absolute sovereign leaves no room for the sovereignty of the people or the state. Therefore, the concept of parliament as a source of law can be seen as blasphemous.<sup>2</sup> Islam rests on the hegemony of the divine law sent down by God through Prophet Mohammed. New rules made by the majority of the people cannot legalize what has been restricted by divine law (Wright 1996).

Whereas liberal constitutionalism enforced by judicial review is well articulated and increasingly common in various parts of the world, theocratic governance has been also gaining broad support. Theocracy is a Greek word similar to democracy and means “the rule of God.” The rulers in theocracies are religious leaders. Theocracy is a particular form of governance dominated by institutions of religious faith.

The recent frequent encounters of these two quite different if not opposed legal worldviews have produced yet another conception of governance, a hybrid—constitutional theocracy. This new notion of theocratic constitutionalism or constitutional theocracy is gaining prominence in Muslim countries and is considered a promising trend that allows through constitutionalization of theocracy to restrain religious radicalism and modernize the state and governance. Constitutionalization of theocratic governments does the same thing as constitutionalism in democracy where majoritarian decision making is constitutionally limited in some areas in order to avoid the tyranny of the majority.

Ran Hirschl who conducted a comparative analysis of constitutional law and courts in non-secular countries argues that the introduction of constitutionalism into theocracy is an excellent strategy to upgrade pre-modern political systems (Hirschl 2010). Although the emergence of constitutional theocracy still stands

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<sup>2</sup> Pondering over a European country’s recently enacted bill that abolishes Natural Law’s concepts of “father” and “mother” and introduces instead Parent A and Parent B, one might indeed have some doubts about the soundness of human lawmaking.

against the basic principles of liberal democracy and secularism, its development is considered progressive as it builds certain bulwarks against religious radicalism. Driessen also believes that combining Islam with constitutionalism is a step forward in the development of constitutional law. New political events in the world, including the Arab Spring, have demonstrated a significant potential for democracy in Islamic societies. “Within the limited space of a semi-democratic electoral regime [in Algeria], Islamist political parties that once espoused an exclusive religious ideology have exercised power in democratic ways, growing in their recognition of the legitimacy of nonreligious political parties and generally promoting the political rights of nonreligious individuals” (Driessen 2012: 187).

Hamoudi calls constitutional theocracy “a new form of government,” a “mutation of religio-legal norms” that enables the archaic government to fit into the modern state paradigm (Hamoudi 2011: 151). Hamoudi regards theocratic constitutional provisions “as symbolic and ornamental for the most part” (Hamoudi 2011: 151–4). “In some instances, one wonders whether this phenomenon is less theocratical constitutionalism and more some form of Islam as ornament, relevant only when the legislature chooses to make it so” (Hamoudi 2011: 154). In other words, Hamoudi believes that the theocratic component of this new constitutionalism is unimportant, as being symbolic or ornamental while the secular constitutional provisions are real and enforceable:

What this effectively means is that Islamic law, as determined by traditional non-state jurists and village clerics alike, is dead and gone. By contrast, theocratic constitutionalism—or the marrying of modern constitutional structures and secular law with religious law—is here to stay, irrespective of who controls the state or its judiciary. (Hamoudi 2011: 157)

That may be true in the long run and if the constitutional court is staffed with representatives of secular elites; indeed, it can act as a secularizing agent, but if it is staffed by Islamic jurists, the effect will be opposite.

Governance in contemporary constitutional theocracies, as opposed to traditional theocracies, is carried out in a very different way, as “power resides in lay political figures operating within the bounds of a constitution, rather than from within the religious leadership itself” (Hirschl 2008: 88). Even though the role of the judiciary still boils down to protecting religious norms and laws, constitutional theocracies do more than “simply grant exclusive recognition and support to a given state religion” (Hirschl 2008: 88). Constitutional theocracies have constraints and limitations on that support in the form of secular, if not liberal, constitutional norms, the Bill of Rights more particularly. “The constitution typically establishes a constitutional court that is mandated to carry out some form of active judicial review” (Hirschl 2008: 73).

Rabb also regards Islamic constitutionalism in Iraq as an attempt to upgrade the Iraqi traditional political system and to create a new democratic one while paying tribute to local culture and Islam. Her study of constitutional theocracy in Iraq is

prefaced by a review of various precedents of constitutionalization of Islam. She develops a taxonomy of constitutional Islamic theocracies based on the degree Islam is constitutionalized in the political system, where constitutionalization is understood as limitation and constraints placed on Islamic law. She tries to determine how Iraq's emerging form of Islamic constitutionalism correlates with previously known practices. Studying precedents of Islamic constitutionalization, she identifies the following three types:

1. Constitutionalization in which Islamic law remains dominant, in other words, Shari's law constitutes in essence a Meta Law, she calls it dominant constitutionalization, which is a misnomer, as dominant remain Islamic law, not constitutionalism. The best illustration of this type is Iran where clerics and Islamic jurists are empowered to interpret Sharia law and conduct constitutional review.
2. Delegate constitutionalization where the constitution incorporates Islamic law as a Meta Law, but its interpretation is delegated to jurists. Saudi Arabia is a model of this type where the constitution "incorporates Islamic law, but delegates its articulation to the jurists" (Rabb 2008: 569).
3. Coordinate constitutionalization where the constitution incorporates Islamic law alongside democratic principles and liberal norms in various forms ranging from the Bill of Rights to federalism, making both Islamic law and liberal prinicples equal in constitutional adjudication. Rabb entertains a very optimistic view of the latter, which in her opinion is what the Iraqi constitutional scheme is all about and which constitutes "the best institutional potential for yielding positive legal outcomes ..." (Rabb 2008: 531).

Morocco and Egypt before the advent of the Muslim Brotherhood to power in 2012<sup>3</sup> were typical examples of constitutional theocracy of the latter type; it mixed Islamic traditions and secularism in one constitutional system and bestowed strong judicial review power onto the Supreme Court composed of legal scholars and secular judges.

In Iraq the situation is similar, as Article 2 of the constitution designates Islam as the official religion of the state and the main source of legislation, while it also promises the full protection of democratic values, human rights, minority rights, federalism and freedom of religious beliefs.

Hirschl goes further in his taxonomy of the models of religion-state relations, and what is more important for our study, he shows interest in how theocratic

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<sup>3</sup> The articles of the new Egyptian constitution under preparation by Muslim Brotherhood that deal with gender equality are written in line with Islamic principles or leave room for ambiguous interpretations. Thus Article 36 of the draft constitution reads that the state will do everything possible to "establish the equality of women and men, as long as this does not contradict Sharia law" ([http://www.ng.ru/world/2012-10-12/8\\_kair.html](http://www.ng.ru/world/2012-10-12/8_kair.html)).

constitutionalism can potentially affect federalism. He claims that secular-religious strife is more difficult to sooth or solve through federalism than, say, ethnic, linguistic or even sectarian tensions. Federalism cannot help as it is impossible to hold a country together with one federal region being secular and another, religious. At least, no solution to this divide has been found as yet. “The ... literature concerning constitutionalism [federalism] as an effective means for mitigating tensions in multi-ethnic or multi-linguistic states does not adequately address the theocratic challenge” (Hirsch 2008 (1): 1211).

### *Theocratic Democracy*

Current constitutional theocracies, in particular the latter type, may qualify for the appellation of electoral democracy, as their executive and legislatures are formed through popular elections. Gunes Tezcur introduces the notion of Islamic democracy with reference to constitutional politics and judicial activism in Turkey and the Islamic Republic of Iran. He comes to a rather pessimistic conclusion that in the long run Islamic democracy is not sustainable and very likely to decay, turning into the tyranny of the Islamic majority, unless the legislative power is constitutionally limited and an independent and strong judiciary exists. The author reaches several other conclusions that are pertinent to our case:

1. Islamic democracy does not offer any institutional bulwark to prevent the tyranny of the religious majority.
2. Judicial review sanctioned by the constitution offers the best protection of individual and minority rights in Islamic societies (Tezcur 2007).

The conclusions that Tezcur draws from his analysis of theocratic democracies are very relevant to the Iraqi case. In Iraq too, there is no institutional bulwark to restrain the permanent and stable Shi'a majority in the parliament; the constitutionally mandated federal chamber formed on territorial and non-majoritarian principles has not been established, while the Iraqi Federal Supreme Court keeps a low profile when it comes to constitutional controversies and federal issues.

### **Iraqi Islamic Democracy and Its Constitutional Dilemmas**

When on May 2, 2003, the UN Security Council passed Resolution 1483 that recognized the US and UK occupying powers, the United Nations reengaged in the governance of a major international security crisis caused by the United States' and United Kingdom's invasion of Iraq. The Resolution required from the occupying powers to create conditions for humanitarian, political and economic well-being of the people under occupation (Scheffer 2003). To administer Iraq during the occupation, a provisional authority was established, responsible also for setting Iraq on the path of democracy.

The role of religions, particularly Islam, in the future political system was one of the key challenges facing the process of drafting the new Iraqi constitution. The divide between the representatives of the three main ethno-religious communities seemed unbridgeable. The Shiites regarded the Sunni Baath regime as a “contemporary manifestation of what is still widely viewed as the systematic repression of Shi'a spirituality by Sunni power elites” (Al-Zubaidi 2011: 66). The majority of the Shiites insisted on the creation of a pure Islamic state where Islam would be the only source of legislation and wanted to prevent the establishment of a secular state, like the one under the previous Baathist regime known for its brutal repression of their religious rights (Chaplin 2006: 275). The Sadrists bloc was particularly adamant in promoting this view, but other Shiite leaders, for instance Grand Ayatollah Al-Sistani, opposed the idea of an Islamic state, though they wanted a constitution that would give a key role to religious leaders at the political table (Smock 2003). In sum, all Shiites agreed on Islam as the main source of legislation and on a supreme court to review the constitutionality of all laws, making sure that no non-Islamic law would be enacted. Sunni Arabs, also Kurds and mild Shiites, had a dissenting opinion; they supported the religious rights of all minorities and rejected a fundamentalist Islamic state for fear of importing the Iranian theocratic model (Chaplin 2006: 275).

After long debates that nearly reached a dead end, just days before the US-established deadline, US Ambassador Khalilzad intervened to mediate between the leaders of the Shiites and Kurds that formed the Council of the Leaders (in the absence of the Sunnis who largely boycotted the constitutional debate). Kurds, in exchange for federalism and Article 140<sup>4</sup>, agreed to some Shiite's demands regarding the place of Islam in the political system, women's issues and the role of religious leaders, provided they would not be enforced in Kurdistan (Galbraith 2006: 198–9). Thus, as a result of the tacit agreement between Kurdish and Shiite leaders, the permanent constitution combines Islam and democracy in an unnatural mix unlikely meant to be enforceable in the entire territory of Iraq.

Certainly, drafting a permanent constitution with a strong Islamic character was a victory for the religious parties over secularists who felt “disheartened” with unexpected US support to the Islamic parties (Galbraith 2006: 199). That also marked a radical shift in US policy that originally advocated a secular Iraq. Bush, on more than one occasion, had said that the Iraq new constitution would separate church from the state (Galbraith 2006: 20). The reason behind this shift was the pressure brought to bear by Shiite religious parties, forcing America to accept an Islamic constitution in order to get concessions from “the religious authorities in other areas and thereby speed up the conflict-ridden process of constitutional reform” (Al-Zubaidi 2011: 68).

Although reference to Islam was made in the previous Iraqi constitutions, the 2005 constitution introduced Islam as the country's official religion, thereby

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<sup>4</sup> Article 140 prescribes the way to solve the issue of disputed territories, including Kirkuk by 2008.

making the established provisions of Islam the basis for future legislation. Many questions regarding the definition of established provisions of Islam remain unanswered, as it is not entirely clear which Islamic doctrine is to be applied to test the constitutionality of laws.

Dr. Farouk Abdul-Karim defines the established Islamic provisions as “Terms of beliefs and moral and practical texts that have proven to be authoritative texts held by consensus.” In other words, the established provisions include all the texts of *Al-Quran Al-Kareem*, *Al-Sunna* and *Al-motawatra*, which contain the Prophet’s frequent conversations, as well as *Ahadeth Al-Ahad*. Further, the established provisions of Islam are those agreed upon by both Sunnis and Shiites (Abdul-Karim 2005: 310).

Many established provisions flatly contradict the principles of democracy concerning state governance and structure, let alone human rights. For example, one of the established provisions emphasizes the inadmissibility of non-Muslims ruling over Muslims (Abdul-Karim 2005: 311). At the same time it is obvious that not all laws are subject to the controversial requirements of Article 2, administrative law being an example, while some others are only partially affected.

The Constitution has assigned the task of “overseeing the constitutionality of laws and regulations in effect” to the Federal Supreme Court, making its decisions “final and binding for all authorities” (Article 93 and 94). Given the constitutional dilemmas that stem from Article 2, reconciling Islamic and liberal principles in every piece of legislation is easier said than done. It is further complicated by the fact that certain Islamic provisions, though considered “established” by some scholars, are contested by others (Saleem 1983:146–56).

### *Constitutional Dilemmas*

The new Iraqi constitution was wrapped up under a stringent deadline set by the United States and was a result of hard bargaining of various, seemingly irreconcilable interests, unexpected concessions and wishful thinking. It could not steer clear of many complicated issues. First of all, the Constitution articulated an imprecise compromise between the local culture, based on Islamic traditions and the democratic values imposed by the occupying power, including loosely defined principles of federalism. Although Rabb (2010) considers this constitutional blend a progressive development under globalization, on a more practical level, the combination of Islam and liberalism in one constitutional system makes constitutional enforcement quasi-impossible and poses conflicting obligations on the government.

Let’s briefly illustrate the Iraqi constitutional dilemmas stemming from the Article 2 requirements. First, while proclaiming Islam the source of law, the constitution does not take account of different interpretations of Islam by various Islamic sects, the way its Afghan counterpart does:

The courts shall apply the Shia jurisprudence in cases involving personal matters of followers of the Shia sect in accordance with the provisions of the law. In other cases, if no clarification in this Constitution and other laws exist, the courts shall rule according to laws of this sect. (Article 131, Afghan Constitution 2004)

Therefore, this recognition of Islam as a source of law by the Iraqi constitution remains imprecise, declarative and does not seem intended to be enforceable.

Second, notwithstanding significant differences in the interpretation of Shari'a by various sects, all Muslims share several common beliefs that clearly contradict the principles of liberal democracy also protected under the Iraqi new constitution. The territory where Islamic and liberal values come into a head-on collision is Section Two of the Constitution that spells out human rights understood quite differently in liberalism and Islam. Below we will briefly remind ourselves of those irreconcilable conflicts that under Iraqi constitutionalism will necessarily arise in constitutional adjudication:—treatment of non-Muslims and defection from Islam;—gender inequality, and—incompatibility of Islam with a modern legal system and justice administration.

Anver Emon analyzes various Quranic interpretations regarding the state of submission of non-Muslims to Muslims and comes to a conclusion that all interpretations are not contradictory and point in the same direction—non-Muslims are treated by Shari'a as inferior (Emon 2008: 274). Related to this is the punishment for abandonment of Islam or apostasy.

### *Religious Pluralism vs. Apostasy*

Apostasy is understood in Islam as punishment for defection from Islam.

... The Prophet said, "If somebody (a Muslim) discards his religion, kill him."  
(Bukhari 52:260, Hadith)

All schools of Sunni jurisprudence along with classical Shiite jurists agree over the punishment for apostates or *murtad*. On the other hands, many current progressive Muslim scholars claim that apostasy is not punishable at all, that "the classical interpretations are more than 1,000 years old, and were formulated at a time of state building where conformity and social cohesion were deemed more important than personal freedom" and therefore now cannot be taken literally (Abdelhadi 2006). The views of progressive Islamic scholars are sound and optimistic, but how is the Federal Supreme Court of Iraq supposed to deal with cases involving apostasy and freedom of religion? Even though Islamic scholars might disagree over its application and related punishment, apostasy, by all accounts, is a clear infringement of human rights, as it is contrary to the freedom of beliefs understood, among other things, as the right to choose and practice a religion, or no religion, without interference by the government.

### *Gender Inequalities*

Matters relating to the family are governed in Iraq by the Personal Status Law adopted in 1959 in line with local traditions and established principles of Islam. According to this Personal Status Code, Muslim women are prohibited by the law to marry men of non-Muslim faith, while men can marry women of non-Muslim faiths (Ahmed 2010: 166).

Polygamy is legal in Iraq, as it is permitted by the 1959 Personal Status Law. This law has been amended several times, but still allows a man to have several wives—up to four (Ahmed 2010: 168). The Kurdistan regional parliament amended this national law reducing the number of wives to two, which does not entirely abolish polygamy and therefore does not remove sex inequality. When it comes to divorce, men and women have significantly different rights. The original 1959 Personal Status Law granted to both genders equal inheritance rights, but ensuing amendments reintroduced the spirit of Sharia law with its complexity in calculation of inheritance shares (Ahmed 2010: 176). As a result, women's inheritance shares are significantly smaller than those of men. Testimony in a court of law is yet another unmistakable sign of sex inequality as by Shari'a law, a woman's legal testimony is not enough and a second female witness is required to corroborate the first one (Fadel1997). Gender inequalities in Islam have been the topic of heated debate for a long time. Many progressive scholars claim that the common accusations result from a deliberate Western interpretation and negative stereotypes. In fact, they claim that Divine Law presented in the Quran has been misinterpreted by men who introduced the gender bias. Even if it is true, this bias has been in place now and the Divine Law is being massively misinterpreted, so this justification makes no difference in the actual impact of Islam.

### *Everyone as a Judge and Executioner vs. the Modern Justice System*

All Muslims are created with an understanding of their obligations to God. The Quran and the Sunna spell out the obligations they need to carry out for salvation. “Unlike in Christianity, where original sin precludes salvation without God’s grace, here each person’s nature enables him/her to act in ways that merit God’s grace” (Gould 2011: 9). In Islam God’s grace is not needed for salvation, as long as you fulfill God’s commandments.

This particular feature has a significant impact on society and government organized along Islamic principles. Islam empowers individual Muslims to take action to correct wrongdoings. The Human Right Watch's report on Sharia in Northern Nigeria reveals a critical point in the discussion of political and legal Islam. The Human Rights Watch reports that Sharia obliges all Muslims to take independent actions whenever they conclude that something wrong is being done. Muslim scholars generally interpret the verses and traditions in the Quran and Hadith so as to place duties upon Muslims at both institutional and personal levels. Obviously, these particular precepts of Islam are in conflict with the basic

principles of modern legal systems. Typically, citizens are not allowed to do justice by their own hands in modern organized society. It seems like in Islamic traditional societies there is no need to refer a crime to a court of law, as Shari'a empowers every Muslim to take action to rectify the sin. If taken literally, it would turn almost two billion people into judges, jurors and executioners. The understanding of justice as self-help has nothing in common with the contemporary justice system.

Neuman notes that in Shari'a the final adjudications will be handed to the people, and he gives examples of Shari'a interpretation on drinkers and homosexuals, noting that according to Shari'a, "Drinkers and gamblers are to be whipped, homosexuals are to be executed, hanged, or beheaded" (Neuman 2009: 313). "Islam constructs an orthopraxy, a set of precepts that each person must follow to be judged favorably on the Day of Judgment ..." (Gould 2011: 5). Foreigners who live in Iraqi Kurdistan can experience this orthopraxy when they take a taxi to go to a liquor store in Christian neighborhoods. A Muslim taxi driver, realizing the aim of your visit to the area, will necessarily refuse to give you a ride back.

Another illustration of this particular feature of Sharia justice is a recent brutal shooting of a lone woman before a cheering mob shown by the world's TV channels in graphic detail. "Roshna Khalid, Salangi's spokeswoman, separately told AFP the 22-year-old woman, named as Najiba, was married to a member of the hardline Islamist Taliban and was accused of adultery with a Taliban commander. Within one hour they decided that she was guilty and sentenced her to death. They shot her in front of villagers in her village. (<http://www.hindustantimes.com/world-news/Afghanistan/Afghan-police-hunt-woman-s-executioner/Article1-885722.aspx>).

Yet another example of the incompatibility of Islam with a modern legal system would be the actions of a young radical Iraqi cleric by the name of Muqtada Al-Sadr. He came to the fore of the political scene in Iraq in the early days of the US occupation, to the point that even Paul Bremer, the head of the Coalition Provisional Authority, had to take account of what Al-Sadr had to say or do (Camp 2011: 19). By 2004 Al-Sadr became the third highest mullah in the Shiite hierarchy, which made him in the eyes of his followers superior even to the President of Iraq.

Al-Sadr formed his own private army and called for an open war against the Iraqi government and the occupation forces. Al-Sadr claimed that the American invasion had been specifically aimed to kill the Imam and soon Mahdi II would return.<sup>5</sup> The statements and actions of Al-Sadr are viewed from the legal angle as a direct threat to secular power and the legitimacy of the state. But Al-Sadr interpreted the Quran in a way that obliged Muslims to join his army by claiming that the laws of God are superior to the laws of men.<sup>6</sup>

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5 Mahdi II was one of the 12 Shiite Imams who is believed to be the savior of the Muslims. He went missing in action and his return has been prophesized since the Middle Ages.

6 Judge Nigar Mohammad criticized this point by saying that Moqtada al-Sadr is "an abnormal phenomenon in Iraqi politics, a very exceptional case not related to the principles of Islam because Islam does not include such provisions" (Personal communication).

Empowering ordinary Muslims to enforce the laws of Islam poses serious obstacles to the cohabitation of liberal constitutionalism with Islam in one political system. But what makes Islam politically powerful and legitimate is support from its huge number of followers, the people. Islam derives its power from God on one hand, and its legitimacy from the people on the other. This makes the task of democracy promoters difficult, as transition to democracy hits a dead-end—the existing political system being fully legitimate as it rests on massive popular support.

Unlike Rabb (2008) and Hamoudi (2012), Tibi believes that the incorporation of Islam into a constitutional system is counterproductive as Shari'a law is the exact opposite of a secular modern law. In this sense, Tibi (2010: 155) argues that Shari'a as a constitutional law will prevent the introduction of modernity (Tibi 2010: 155). Professor Gould also examines whether Shari'a can constitute a basis for constitutional regime and whether Islamic constitutionalism can be integrated into liberal constitutionalism and finds out that Western constitutionalism is processsed based while Islam is value-centered and that the constitutionalization of Islam which is based on moral obligation, not procedural rationality will constitute a problem (Gould 2001: 7). An-Naim also claims that for the best of the Muslim society a secular state is needed (An-Na'im 2006).

### *Conflicting Obligations of the Federal Supreme Court*

Can conformity to Islam be established through constitutional adjudication and court rulings? Since Shari'a is not codified, judicial review for conformity with Shari'a can mean many different things and gives courts vast discretionary powers. "Islamic law is a complex legal system, and its incorporation into modern state structures demands a particular institutional arrangement for interpreting the law. Once a constitution has declared Islamic law to be a source of legislation, political leaders and other interested actors determine how legal processes will play out" (Rabb 2008: 577). Islamic constitutionalism, to Rabb, is possible, but for it to be enforced, an important role should be assigned to jurists, a cast of Islamic scholars that have undergone particular training, authority and legitimacy and have "competence to interpret Islamic law" (Rabb 2008: 577). Therefore, the success of Islamic constitutionalism depends on attention to the jurists and their interpretive methods, as well as on the staffing of the courts. Although the Iraqi constitution incorporates Islamic law, it does not establish Islamic law courts. It empowers solely the Iraqi Federal Supreme Court to watch over the constitutionality of legislation.

The adopted constitution gave the Federal Supreme Court the responsibility of "overseeing the constitutionality of laws and regulations in effect" (Article 13), in other words, a strong type of judicial review.

It also specified its composition as "a number of judges, experts in Islamic jurisprudence and legal scholars:

The Federal Supreme Court shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the members of the Council of Representatives.

However no such law has yet been enacted and the experts in Islamic jurisprudence and legal scholars have not yet been incorporated into the operation of the court (Global Justice Project: Iraq). The Court is composed of nine members and functions under the Rules of Procedures issued by the Court in 2005. Kurdish constitutional law professor Sarhang points out that “The seats were distributed over Shia, Sunni, Kurds and Turkmans based on political agreements between the sects and political parties, but Shi'a justices are dominant on the Court. Due to political instability in Iraq, Dr. Sarhang continues, the Court's seats were divided between the sects and political parties” (Sarhang 2012).

In 2011, the Iraqi parliament presented a law proposal on the rules of staffing the Supreme Court, similar to the proposal prepared by the Court itself in 2008. The law on the recruitment and staffing of the Supreme Court is meant to remedy the situation during the constitution writing when various actors could not agree on the modalities in this matter and “were unable to agree on an exact formula of Islamic and secular judges” Visser 2011(1).

According to the new proposal,

The court will consist of 13 members altogether, including an advisory board of 4, half of which will be ordinary legal specialists and half, will be specialists in Islamic law. In other words, the only quota for Islamic judges relates to the 4-person advisory board, which does not take part in deciding cases as such. The recruitment procedures are also remarkable: The higher judicial council, a body largely made up of career judges ... will propose three candidates for each of the 9 positions in the court proper, with the field limited to judges with a service of no less than 20 years; the president of the republic will then select one of the candidates for each position (in other words, the law creates a prerogative of the president which is not described in the constitution!) As for the four members of the advisory board, four professional judges will be nominated by the ministry of higher education and four Islamic ones by the two Islamic endowment (waqf) authorities (hence, one Sunni and one Shiite), with two from each group being selected by the government and approved by parliament. (Visser 2011: 1)

Finally, the nominations are to be confirmed by the Iraqi parliament.

## **Constitutional Adjudication**

Almost a decade after the adoption of Iraq's constitution, the Federal Supreme Court has been involved in only a handful of decisions relating to the Article 2 area,

the conformity of legislation to the “established provisions of Islam” and to human rights; and that is despite the fact the Court is “empowered to engage in precisely this type of review under Article 2 of the Iraqi constitution” (Hamoudi 2010: 692). Over the same period, the Supreme Court has been fairly active and rendered over 500 decisions. The broad lack of concern with Article 2 would be not only startling, but, in fact, rather shocking (*Ibid.*: 692–3). Hamoudi also believes that the Court’s behavior is not related to the possible “unwillingness of a supposedly weak judiciary to address sensitive matters, as the Federal Supreme Court has not hesitated to issue opinions on quite controversial matters of considerable political importance” (Hamoudi 2012), including the resolution of the major governmental crisis after the 2010 legislative elections. Kurdish constitutional law professor Sarhang is convinced that the Court does not want to deal with Islamic law because decisions would need to be in compliance with Islamic Sharia law, as interpreted by the Shia clerics in Najaf, something that the Court would want to avoid. Besides, if “the Court set a precedent of meddling into Sharia law, hundreds of cases would follow” (Sarhang 2012).

Practically, the court avoids “judicial review for compliance with Islam” based on Articles 2 and 93<sup>7</sup> of the Constitution, and prefers the parliament to get involved in this matter, since from the Court’s perspective, the law-makers are better placed to take account of all religious sects and amend or enact laws in line with the existing practice of established precepts of Islam. This is the typical behavior of a constitutional court in a political system with parliamentary supremacy, but the Iraqi constitution confers onto the Federal Supreme Courts powers unusual for a parliamentary system—judicial review after enactment. This type of review introduces judicial supremacy, as the judiciary can overrule the parliament after it has enacted legislation. The constitution introduced judicial supremacy by conferring a strong review power to the Supreme Court. The Iraqi Court, however, does not seem ready yet to assume this new important role in Iraq and take up associated challenges.

There have been only a few cases so far pertaining to Article 2. One case dealt with contract law, a European borrowing widely accepted in the Muslim world. Therefore, the Federal Supreme Court overruled jurists in their interpretation of Islamic law regarding contracts. Professor Hamoudi states that this decision (Decision 60, 2010) “does not do much violence to the broad understanding of the role of Islam in the modern Muslim state” (Hamoudi 2012). He claims that this case was rather innocuous and did not bear much on the purity of Shari’ā.

Where legislation largely draws on transplanted sources, there is tacit agreement that Islamic doctrine is not relevant, and the Court will find an interpretation that upholds the legislation that exists. This leaves precious little by way of

<sup>7</sup> Article 93 empower the federal Supreme Court to oversee the constitutionality of enacted laws and regulations, or in other words, confers an American-style judicial review power.

constraint in the Constitution on legislation so as to ensure its broad conformity with Islamic rules. (Hamoudi 2012)

The second case, also analyzed and reported by Hamoudi, deals more directly with both Islam and the liberal Bill of Rights as it pertains to the family code. This time, the Court did not question the wisdom of jurists from Najaf and upheld their decision. The case was rather delicate. A Shi'a woman appealed the decision of jurists because she had been denied the right to divorce. The decision was not simple for the Supreme Court, as unlike Shi'a, Sunni women had this right under the 1959 Personal Status Code. The Court upheld the jurists' decision, although the ruling was clearly in violation not only of gender equality protected by the Bill of Rights, but also sectarian equality. Hamoudi claims that "the Court may have been tempted to side with Fatih [the woman that had filed the appeal], who after all was only seeking to exercise the same right to divorce that her husband had" and her fellow Sunni women had, "but the Court hardly wanted to put itself in the position of arbiter over the Islamic doctrine, even if the constitution entitled it to do so. It saw no need to engage in competition with Najaf on the matter ... The Court does not need Grand Ayatollah Sistani as an enemy" (Hamoudi 2012 (2)).

Professor Hamoudi reports yet another case that verges on Article 2. A litigant wanted to challenge the law that allows the appropriation of 10 per cent of Islamic charitable trusts [*waqfs*] for administrative fees. The appellant claimed that it was a direct violation of Article 2 because Sharia rules did not permit the assessment of administrative fees for *waqfs*. The Court avoided to rule on the basis of Article 2 and, again, referred the matter to the legislature that in its opinion was better placed to address the issue (Hamoudi 2012 (1)).

As of now, indeed the Court keeps a low profile and shies away from assuming an important role within the political system bestowed on it by the constitution, but this situation can change. The Court already evinces signs of growing political engagement. As the majority of the justices are Shi'a, their decisions seem to favor the current parliamentary majority. Visser examines a rather questionable ruling made by the Supreme Court regarding the status of Iraqi independent commissions, important central entities created by the constitution to insulate vital political and economic areas from majoritarian rule. These commissions, along with the Central Bank, are, again, created in the spirit of liberalism and do not seem to wed well with local culture.

Among these independent bodies in Iraq<sup>8</sup>, the most prominent one is the Iraqi Electoral Commission. The Court ruled to submit (attach) this Electoral Commission to the Council of Minister, which openly violates the whole idea of independent bodies that were formed to act independently of the elected

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8 The Constitution mandates the creation of the High Commission for Human Rights, the Independent Electoral Commission, the Commission on Public Integrity; as well as the Central Bank, the Board of Supreme Audit, the Communication and Media Commission and the Endowment Commission.

majority in the country. After the mess of the 2010 national legislative elections, when the cabinet could not be formed for almost a year, the Court decided to streamline the electoral process and attach the Independent Electoral Commission to the executive.

In a lengthy ruling, and probably one of the more innovative pieces of jurisprudence ever produced by the court, it has decided that henceforth the “independent commissions” and in particular the Iraqi election commission (IHEC) is to be “attached” to the executive branch of the government. (Visser 2011 (1))

Visser points out that this decision contravenes the crisp clear constitutional provision on the establishment of independent commissions, as stated in Article 102:

The High Commission for Human Rights, the Independent Electoral Commission, and the Commission on Public Integrity are considered independent commissions subject to monitoring by the Council of Representatives, and their functions shall be regulated by law. (Article 102)

Visser further gives sarcastic comments on this verdict: the Supreme Court “detected an ‘error’ in the 2005 constitution … and fixed it by ruling in favor of the Cabinet against the constitution itself” (Visser 2011(1)). This ruling is indicative of, first, the Court is vulnerable to pressure and, second, the amount of pressure that can come from the Cabinet may be significant. In other words, the Cabinet formed by the parliamentary majority can exert such pressure on the Supreme Court as to push it to make an unconstitutional decision.

In a more recent case, the Court showed again its affinity with the Shi'a majority in power when the Court shielded a Shia minister of Education in the Federal Government from parliamentary questioning:

What we have here is a very clear case of the Iraqi Supreme Court producing a ruling that seems politically biased to the point where it apparently overrules the Iraqi constitution and the right of parliament to hold ministers accountable. (Visser 2012: 16)

Another decision that bears more directly on the devolution of power and Iraqi federalism stands also as proof of the Court’s increasing bias in favor of the parliamentary majority. Since the passage of the Federalism Law in 2006 that in essence reiterated the main constitutional provisions that had established a loose federation in Iraq, the central government has gradually clamped on the constitutionally guaranteed right of governorates to establish new federal regions. With the help of statutes and the Supreme Court’s decisions the government in Baghdad has managed to bring Iraqi provinces under tighter central governmental control and that despite Article 115 of the constitution that grants residual powers to federal regions and governorates. The Court displayed a clear tendency to

either ignore certain constitutional trespasses by the federal government or has deliberately ruled in favor of the central government.

In January and February 2010, two federal laws, Law 18 and Law 20 were enacted in the spirit of further devolution of central authorities; the bills required a transfer of some responsibilities of the Ministry of Municipalities and Public Works as well as the Ministry of Labor and Social Affairs to governorates. These two laws were identical and passed several functions—the personnel and property of the ministries—on to governorates. These laws did not apply to the three governorates of Iraqi Kurdistan, which is a federal unit by itself, as well as to the Kirkuk governorate pending in the latter case the resolution of the constitutional issue over the disputed territories. These legislative acts were well in line with the constitutional provisions on decentralization:

Governorates that are not incorporated in a region shall be granted broad administrative and financial authorities to enable them to manage their affairs in accordance with the principle of decentralized administration, and this shall be regulated by law. (Article 122, Paragraph 2)

By the end of May 2010, the governorate of Karbala completed a new structure for its department of Public Works in compliance with the new legislation, but in June the Supreme Court “froze” further implementation of Laws 18 and 20, and on July 15, 2010, declared both laws to be “unconstitutional” (Research Triangle Institute 2011).

The outburst of the Supreme Court activism looks strange, so does the logic and grounds for such a decision.

The Supreme Court concluded that the laws were unconstitutional because they originated in the national parliament itself and not with the Council of Ministers. In reaching his conclusion, Chief Justice Medhat al Mahmood repeated a distinction the Constitution makes between “draft” and “proposed” laws in Article 60. On his reading, the national parliament may “propose” but may not “draft” laws, and because Laws 18 and 20 had been drafted by the Council of Representatives, rather than drafted by the Council of Ministers, the laws were void. (Research Triangle Institute 2011)

## **Kurdistan Legislation Defying the Federal Constitution**

The Kurds are different from the Iraqi Arab majority in many respects, including in the degree of religiosity. Although the majority of the Kurds are devout Sunni Muslims, its elites, many of whom have been educated in the West, are less religious and even tend to reign over religious zealots in the region. The current Iraqi president, an ethnic Kurd, once said: “the Kurds will never submit to an Islamic order,” while KRG President Masoud Barzani echoed him: “Kurds won’t

accept an Islamic identity ... ” (Quoted in Rafaat 2007: 278). KRG officials periodically meet with Kurdish religious leaders to urge clerics to “remain tolerant in the face of new social changes in Kurdistan” (Kurdish Globe, March 3, 2012).

One can surely say that the people’s mindset and expectations in Iraqi Kurdistan are quite different from the rest of the country. The local government entertains a quite liberal outlook on many issues that would normally fall within the purview of clerics and mullahs. The KRG has launched many modernization programs in pursuit of several ends: maintaining an image of Kurdistan that is attractive to foreign investors, as well as restraining the influence of clerics in order to promote market relations and good governance. A strong indicator of the Region’s secular penchant is that religious political parties are not very influential in Kurdistan. As a result, laws passed by the Kurdish parliament often come into contradiction with Article 2 of the federal constitution.

Since 1991, when the Region came under the authority of the KRG, women in Kurdistan have been enjoying more equality and freedom and have been more protected than in the rest of Iraq. In 2002, Law 14 enacted by Iraqi Kurdistan’s parliament banned traditional honor killing<sup>9</sup>. The law reads, “Crimes against women with the pretest of ‘honorable motivation’ will not be legally liable for lenient punishment and Article 128, 130 and 131 of the Iraqi Penal Code will not be implemented” (Hosein 2005: 215).

Many other local legislative acts and amendments to federal laws have been introduced by Iraqi Kurdistan’s parliament that can be held as not squaring well with Article 2, and would need to be struck down by the Federal Supreme Court as non-compliant with the established provisions of Islam that the federal constitution protects. Let’s review some of them.

It is well known that in Sharia law, adultery is a crime punishable by either 100 lashes for the unmarried or murder for the married. The Iraqi Penal Code distinguishes between husband and wife in the penalty; it punishes the husband if he has committed adultery in the marital home only. The second paragraph of Article 377 in the Iraqi Penal Code has been amended by the Kurdistan parliament; it establishes a significantly softer punishment for husband and wife, which may be contrary to Islamic law as mentioned in *Quran-Surah Al Baqarah*.

“Iraq, in contrast to many Arab countries, has one unified Personal Status Law which is considered one of the most progressive in the Arab region with regards to women’s rights. However, the Kurdish amendments to the law further extend women’s rights in marriage, divorce and inheritance, by, for example, placing

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<sup>9</sup> Honor killings are acts of vengeance committed by male family member against females, who are held to have brought dishonor upon the family by refusing to enter into an arranged marriage, being the victim of a sexual assault, seeking a divorce or (allegedly) committing adultery. (*Violence Against Women and “Honor Crimes.” Human Rights Watch*. As many as 133 women were killed in Basra alone in 2006–7 (Damon. 2008).

more restrictions on polygamy, and giving more rights to women in divorce” (Al-Zubaidi 2009)<sup>10</sup>.

The national Personal Status Law amended in the Kurdistan Region by Article 38 of Law No.15 in 2008 came into contradiction with the established constitutional provisions of Islam, as the Kurdish amendment required the wife’s consent if the husband wants to divorce and “return” her during “the waiting period,” which lasts three menstrual periods (three months). Ironically, this amendment was struck down by the Kurdistan Supreme Court in its ruling No 128 of April 25, 2010 based on consideration of “public order.”<sup>11</sup>

According to the latest amendment to the Personal Status Law enacted by Kurdistan’s parliament (Amendment Act No. 15 of 2008), the husband’s relatives are prohibited to live together with him and his wife, including his parents. This is contrary to the established provisions of Islam, which urge to strengthen family ties and kinship.

The said amendment to the 1959 Iraqi Personal Status Law made by the Kurdistan regional parliament in 2008 addresses the matter that stands as undeniable and outstanding proof of gender inequality in Islam—polygamy. Although the new law does not entirely ban polygamy, it reduces the number of wives a man can marry from four (allowed by Sahri’s) to two.<sup>12</sup> This piece of legislation enacted by the regional parliament goes counter the federal constitution in two ways:

10 “*Noshouz* according to Article 25 of the Iraqi Personal Status Law applies only to the wife. The Kurdish amendment applies *noshouz* to both husband and wife as follows:

1. When a spouse leaves the home without permission and in an illegal manner (leaves or abandons the home? And when would anyone who abandons a home ask for permission, it defeats the meaning of the word? And what be a legal way of doing it?)
2. Failing to carry out marital duties adequately or carrying them out with the purpose to harm the spouse (adequately by the standards of who or what? Is there reference? And which ones would be the marital duties that if carried out “adequately” would cause harm—do duties to harm exist?)
3. Ahusband failing to provide a home for his wife that is socially and economically appropriate. The amendment also obliges courts to investigate properly before issuing a verdict on a spouse accused of *noshouz*. ”

11 Personal communication with Nigar A.Mohammed Agha, Judge and Foreign Relations Director, Kurdistan Judges Union .

12 Polygamy as practiced in Islam is often misunderstood. Polygamy has always existed in human society in one form or another. It is widely spread in contemporary Western countries in the form of serial polygamy/polyandry when a man or a woman gets married several times. Islam introduced clear rules by allowing a man to marry up to four wives. At the same time, Islam encourages monogamy and considers marriage as an important and sacred union between a man and woman that fulfills one’s important religious obligations. Celibacy is forbidden in Islam (Jaafar-Mohammad 2011). No wonder that the Kurdish parliament failed to entirely ban polygamy significantly because it faced objections coming from single women.

1. This amendment, as we have seen, does not square well with the established principles of Islam.
- 2 It may have broken conformity to the hierarchy of laws established by the constitution, as the all-Iraqi Personal Status Law seems to be subject to federal authority and, consequently, cannot be amended by a regional legislature. Some legal experts can argue that under the new constitution Iraq is a rather loose federation and would refer to Article 121, Second Paragraph that reads:

In case of a contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region.

Family status matters pertain both to the established principles of Islam and to the Bill of Rights and, therefore, should be considered as the exclusive jurisdiction of the federal center.

It is fair to mention here that for all practical purposes, the Kurdish amendments to the federal Personal Status Code that were meant to outlaw or just reduce the practice of polygamy in Iraqi Kurdistan remains largely ineffectual. A Kurdistan court made a decision in a criminal case that virtually nullified the amendments related to polygamy; it ruled that there is no crime in marrying a second wife without the first wife's consent. What is more, the first wife has no right of complainant in case when the second marriage contract has been done outside the Kurdistan Region.

## **Discussion and Conclusions**

The relationship between Islam and democratic politics nowadays is increasingly active to the point that it has brought about the emergence of a new constitutional system that attempts to combine Islam and democracy. The new Iraqi constitution is an excellent illustration of it. This new constitutionalism lays contradictory principles in the groundwork of the country's political system and thereby places conflicting obligations on the government, including in the federal relationship. The regulation and fine-tuning of federal relations in Iraq are to be carried out by a territorial chamber of the national parliament and by the federal Supreme Court. The territorial chamber has not been established, while the Supreme Court has proved indisposed or unable to interpret the constitutional provisions that put conflicting doctrines into the foundation of the constitutional system. The coexistence of an elaborate Bill of Rights and a constitutionally mandated state religion in one political system makes constitutional interpretation quasi-impossible. Because Shari'a law is not codified, review for conformity with Shari'a can only be done by Islamic jurists or mullahs, not judges.

Strong nationalistic feelings and tribal loyalties in the Kurdistan Region have weakened religiosity and contributed to a more secular mindset. As a result Iraqi Kurdistan's parliament has passed several bills that go counter to Shari'a tenets, like the laws banning honor killing and polygamy. Yet the enactment of these clearly unconstitutional laws as not-conforming to the Shari'a doctrine provoked no reaction of the Iraqi Supreme Court.

The federal relations in Iraq are not well-established partially because no efficient institutions for enforcement, adjustment and fine-tuning are in place. The Supreme Court has not become a watchdog of Iraqi federalism specifically because the constitution contains deeply conflicting principles. The Iraqi constitution-makers did not foresee the pitfalls of laying religious and liberal principles at the federal state foundation. Islam is a civilization very different from Western Christian traditions and in obvious conflict with liberal human rights. How is the Iraqi government supposed to behave in cases where constitutional provisions guaranteeing human rights and Islamic principles collide? Even though some scholars believe that the Islamic component of constitutional theocracy is symbolic or ornamental and therefore inconsequential for the political system, much depends on how the Supreme Court and the judiciary as a whole view the constitutional obligations to Islam. If Iraqi courts side with Islam and thereby sacrifice human rights as we know them, slowly but steadily the judiciary will marginalize human rights otherwise protected by Section II of the Constitution: Rights and Liberties. The effect of such a shaky constitutional foundation will be felt in the realm of human rights and federal relations in the first place, but will go beyond.

At such an early stage of Iraqi constitutionalism, it doesn't seem apparent which side—Islam or liberal human rights—will prevail in constitutional adjudication. The Iraqi judiciary deliberately stays on the sidelines of potentially sensitive constitutional matters, as the Federal Supreme Court steers away from the Article 2 area as well as from federal issues. The Court indeed eschews cases that implicate issues stemming from the Islamic/liberal nexus of the Constitution, by referring them to the legislature. Sending constitutional matters to the parliament is the typical behavior of the judiciary in countries with parliamentary supremacy, like the United Kingdom. The Iraqi Supreme Court has even more reasons to do so because of the profound conceptual controversies of Article 2. The Court's typical statements in such cases are that "detailed and specialized review is required and there is a need for new legislation that would take into account Iraq's diversity." This way, the Court avoids making rulings on the basis of Article 2 and refers controversial cases to the legislature, turning a constitutional question into a statute matter that should be determined by parliamentarians, not judges or jurists. For the time being, the Federal Supreme Court is very unlikely to adopt a more activist stance on issues pertaining to Article 2 or to federalism although it evinces signs of tentative engagement. Iraq remains in the tinderbox of religious tensions, which causes the Court to show restraint; the only way the Federal Supreme Court can build its legitimacy and gain authority amongst all factions is a cautious approach.

Under the new “dangerously divisive” Iraqi Constitution (Seymour 2006), mullahs and clerics keep playing a destructive role vis-à-vis constitutionalism. Friday prayers are often inflammatory political speeches. Clerics delve on many constitutional matters in such areas as marriage, divorce, and inheritance, taking them away from the realm of legalism and liberal human rights. One can say that under the new constitution, the role of mullahs has not decreased, while liberal rights and civil liberties have not been promoted and remain latent under a constant threat of laws enacted by the majoritarian rule of Shi'a in Iraq. The incongruity of the foundational principles of the Iraqi constitutional system has not been brought to bear on the federal relations as yet; these principles remain overly declarative due to the lack of enforcement, mainly through avoidance by the Federal Supreme Court of the cases that arise from Article 2's contradictions.

The controversies of Article 2 can potentially affect federal relations, as the Kurdish legislature enacts one after another liberally-flavored laws whose full conformity with Article 2 cannot be achieved. As a result, the sword of Damocles is hanging over Kurdish legislation and, significantly by the same token over the federal relationship. The prudent Federal Supreme Court keeps a low profile in constitutional adjudication. Even in 2011 when the federal government denied the two governorates that attempted to form a federal region similar to Kurdistan, the Federal Supreme Court remained silent. However, this situation cannot last forever. Given strong Islamic traditions in Iraq, the combination of Islamic principles and liberal constitutionalism in one political system is likely to lead to a situation where liberal rights, including federalism, are likely to be sacrificed. A suddenly activist Federal Supreme Court can destroy the fragile federal edifice in Iraq.

We are afraid that under propitious circumstances the Islamic constitutional symbolism of Iraq's constitution may be caught up in politics and be used against the liberal component as we have seen in the cases when the Court acted on political expediency and favored the governmental majority when it ruled on the status of independent commissions and the decentralization bills.

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# Conclusion

Iraqi constitutionalism bears the imprint of what Jon Elster terms “classic contradictions of constitution making” the hardest way:

1. Constitution-making emerges from a major crisis, i.e. under conditions that are likely to work against a good and long-lasting constitution;
2. The public will to make major constitutional change is unlikely to be present unless a crisis is impending.

Indeed, Iraq’s constitution was adopted not only during a major domestic crisis, but also during a foreign invasion that had pulverized Iraqi statehood and caused the country’s utter disunity. The creation of a federal region in Northern Iraq was meant to keep the country from an imminent breakup by accommodating the increasing demand of the Kurdish minority in the North for more autonomy. Federal design was also viewed as a step forward to establish quality democracy in Iraq. The Iraqi constitution makers and their international assistants regarded federalism as a means to keep the territorial integrity of the deeply divided country. Kurdish politicians played a prominent role in constitution making. Accepting the USA-sponsored idea of federal division of powers, they have carved out a significant autonomy within the Iraqi new political system. The Kurdistan Region has an elected parliament and all governmental structures necessary for carrying out all state functions.

In this book, an attempt has been made to determine which way the proverbial paradox of federalism has been playing out in Iraq. The paradox as identified in federalist studies consists in the potential of federal systems for both:

1. Offering a solution to deeply divided societies and a mechanism of maintaining the international borders intact;
2. Promoting separatism by the development of state institutions and governmental structures in federal regions preparing for an ultimate secession of aggrieved regions.

Therefore, the overall goal of the book and of each chapter was to determine whether the new federal system is taking root or the Iraqi Kurdistan Region is all set for independence. In the empirical chapters dedicated, in our view, to the most likely areas where the paradox can manifest itself, we analysed evidence with a view to answering the following question: Is federalism in Iraq a good means to maintain the territorial integrity of the state or is it used by the Kurds as

a mere stepping stone towards a breakup of the country and ultimate declaration of independence? We have explored this issue in detail through four empirical investigations of the key aspects of federalism in the Iraqi context: peculiar regional security arrangements, Kurdistan's activism in the international arena, complications of revenue sharing and the incongruity of constitutional principles also likely to have an impact on the federal relationship.

The extensive literature review shaped into an explanatory framework enlightened the examination of the empirical cases. The history of federations is replete with examples of polities which are now in existence and seen as examples of federal success stories. The first federal country, the United States of America, took a civil war to resolve some issues of its federal character. Canada, often seen as of great relevance to Iraq and the Kurds because of the ethnic nature of its federalism, came within a few percentage points of a referendum poll of supporting independence at the height of the Quebec secession and independent movement in the 1970s and the 1990s. Since then, buttressed by purposeful efforts on both sides, including constitutional amendments and the Supreme Court rulings, the intensity of secessionist aspirations has subsided, and Quebec proudly proclaims and asserts its own identity within Canada. However, the evolution of federalism elsewhere, in the developing world in particular, has gone through violent upheaval, strife and war, which provide federalism its toughest challenge.

We contend that like in Canada, the territorial devolution of power and polycentric governance in Iraq can bring peace to the divided society; nascent federalism can be adjusted and fine-tuned through limited constitutional amendments, judicial interpretation, fiscal arrangements and intergovernmental collaboration. The Kurds, like the Quebecois, may eventually learn to live together with their federal partners.

Previous years saw armed resistance by the Kurds to their integration into a unitary Iraqi state which did not recognize their identity. That included military interventions and genocidal actions in the Anfal campaign by the Ba'athist regime of Saddam Hussein. Following the establishment of a no-fly zone in 1991, the Kurdistan Region gained *de facto* autonomy within Iraq. During the Kurdish civil war in the mid-1990s, the leaders realized they needed to put in abeyance their bitter rivalry otherwise all gains made by the Kurds would be lost. In the absence of great power support for independence and faced with hostile neighboring countries, the Iraqi Kurds decided on their own volition to join in a federal and pluralist Iraq in which they would maintain their considerable autonomy. A tremendous opportunity presented to them when a new, democratic Iraq emerged from a foreign intervention. The Kurds wholeheartedly espoused the idea of new federalism, promoted through their active participation in constitution-making and the federal government.

Iraqi federalism is in its early days, many constitutionally prescribed mechanisms and institutions are not fully in place, while some remnants and leftovers of the previous relations that the new constitution tacitly allowed, like the *Peshmarga*, Kurdistan's representations abroad may be easily misinterpreted as

deliberate attempts by the Kurdistan Region Government to resist or even obstruct the federal relationship. The heavy legacy of distrust and suspicion makes the learning process slow and painful.

In new federations, autonomy is quite often considered and treated by the central government as a rescindable gift of the political center that can be taken back at any time (McGarry 2008: 88). Such apprehensions are acutely present in Iraqi Kurdistan where the population and elites fear that Baghdad, once strong again, will curtail Kurdish autonomy and revert to assimilative integration under the old banner of Pan-Islamism or Pan-Arabism. The consolidation of the Shia majority in Baghdad and its desire to build a strong Iraq frighten the Kurds and their elites whose memories of a strong Baghdad cause macabre reminiscences. Therefore, we looked at the hard facts of the KRG's actions and intentions in the most sensitive and controversial areas that lend themselves for equivocal interpretations, areas where clear signs of the potential for secession can be seen.

Is the existence of strong regional armed forces an undeniable sign of the intention to break away or there may be more benign interpretation? Is an activist regional foreign policy an unmistakable sign of separatist aspirations or there may be a more innocuous reading into these developments? Are disputes over revenue sharing between Baghdad and Erbil irreconcilable, likely to deal a dangerous blow to Iraqi federalism? Or can these disputes find less dramatic outcomes? And, finally, does the hastily written constitution under occupation that combines the overly contradictory principles of Islam and liberal democracy constitute a threat to federalism in Iraq?

The defense forces of federal regions, usually known as state guards, state military reserves, or state militias are quite uncommon in federal systems. The US National Guard is a rather singular exception, although it is not an independent armed force as it is partially funded and used by the federal government. Territorial defense forces in ethno-federal states are always dangerous security arrangements and as such can be viewed as a strong indication of a secessionist mind-set in the region. Iraqi Kurdistan possesses powerful territorial armed forces developed in the past to face threats to the national identity from the central government in Baghdad. It has carried its existence into the federal Iraq and even has an implicit constitutional recognition. Obviously, the presence of this powerful army in the Kurdish ethnic federal region causes analysts to ask many questions and provides strong additional evidence in support of the view that the region is preparing to break away from the federation. We have found, however, serious extenuating circumstances in our study case. The *Peshmarga*, police and secret services had been formed in the region long before the creation of the current Iraqi federation. Attempts have been made to transfer the *Peshmarga* under partial federal control in order to comply with the federal center's demands. The institutional design provides for such transfer and collaboration. We should also bear in mind that the KRG current defense force was formed as a result of the merger of the military and security arms of the two Kurdish political parties that had quite tense relations in the recent past. The merger is not full, as the parties keep exercising control over

their respective troops. There is still some sense of distrust even among these two Kurdish parties. This is to say that the existence of the *Peshmarga* in Kurdistan is a legacy of previous conflicts, not a new development within the recently established Iraqi federal system. Had the constitutional provision prescribing the resolution of the disputed territories problem been implemented, the salience of the *Peshmarga* in the federal relationship would have been significantly lower.

The second most important warning sign of a federal region's secessionist aspirations is its active engagement in independent foreign policy. We contend, however, that the main driving force behind the KRG's activism in the international arena is the desire to assert the Kurdish identity at home and abroad, not to secede from the federation. The culture and language have played an important role in preserving and developing the Kurdish community in the past. We have seen enough evidence to claim that a strong motivation for the Iraqi Kurdistan Region's active diplomacy lies with national identity and should not be interpreted as a forerunner to secession. If we use the conceptual dichotomy suggested by Balthazar (1999) "paradiplomacy vs. protodiplomacy," KRG activism looks more like paradiplomacy when a sub-national unit engages in international relations without a hidden agenda to finally break away. KRG Minister Bakhir makes a clear distinction between "foreign policy" that KRG is not doing and "international relations" that the KRG is necessarily involved in. In other words, KRG diplomacy looks significantly closer to paradiplomacy than to protodiplomacy. We are well aware that Kurdish diplomacy cannot be fully understood as culturally driven phenomenon only. Undeniably, economic factors and the desire of the Kurdish elites to benefit from lucrative contracts with foreign companies play a significant role too.

We have also seen that some of the structures and actions to sustain KRG diplomacy are in fact, leftover from the situation when Baghdad and Erbil were engaged in an all-out war in the 1980s–1990s. In fact, many current KRG representative offices abroad are the remnants of the Kurdish political parties' foreign representations that existed long before. Now the two major political parties, the KDP and the PUK have ceded their foreign offices to the KRG, although not entirely as their representations are still staffed by members of respective parties, rather than civil servants appointed by the KRG. This way, the KRG's diplomacy is not so much directed against the federal government, as it is caused and fueled by inter-Kurdish protracted problems.

The curse of oil too is brought to bear on the federal relationship in Iraq quite hard. The Iraqi Kurdistan Region is endowed with lavish deposits of oil and gas. By some estimates, the region's oil reserves are comparable to those of Libya. The KRG actively develops and explores natural resources available in the region. In the absences of an unambiguous legal framework for resource sharing, every new contract that the KRG signs with an international company causes nervousness and unease in Baghdad. Oil and gas are so important that this matter is addressed by the constitution that contains provisions on energy revenue sharing. The Iraqi constitution clearly states that the management of gas and oil does not fall within

the federal government's exclusive powers; the constitution mandates though full submission to the federal budget of all revenues coming from the developed oilfields and preferential use of the revenues from newly discovered oilfields for the needs of the Kurdistan Region. However, the relevant constitutional provisions remain ambiguous and are interpreted selectively by both parties, while the Iraq Hydrocarbon Law drafted in 2007 has never been enacted, as the two parties have failed to find sufficient consensus. At the same time, Erbil passed a Kurdish regional oil law based on a broad interpretation of the federal constitution. The use of natural resources remains a very important matter for Iraqi federal relations and one of the most serious challenges to Iraqi federalism.

In the absence of interjurisdictional synergy in the Iraqi federation, the coalescence of interest of federal and regional ministries, global oil companies, and neighboring countries is likely to maintain the current federal Iraqi system. The radical change of the Iraqi political system introduced by the 2005 Constitution will need time to take root and to function smoothly after all actors find their places and accept the new rules of the game. Regarding the paradox of federalism, we can confidently claim that in the short to medium term the federal system will provide a framework within which the different political elites will benefit from the current *status quo*. In the longer term a deal will need to be done to resolve key issues with regard to natural resources sharing. The federalization of natural resources remains one of the toughest areas to negotiate. Regional geopolitics and the Kurdistan's dependence on the central government for its revenue will likely maintain the Kurdistan Region's place in a federal Iraq. The successes of the Kurdish federal region in Iraq are stunning and can be measured by its high political status domestically and internationally as well as an impressive economic growth. These are undeniable signs of the success of federalism in Iraq that no one in Kurdistan would want to undermine.

It has been seen from the review of our cases that a good deal of problems Iraqi federalism faces are caused by constitutional ambiguities. These constitutional flaws stem from the particular circumstances surrounding the negotiation of the 2005 Constitution and impose a great strain on Iraqi federalism. The Iraqi Constitution lays contradictory principles in its constitutional groundwork, placing conflicting obligations on the government. It remains to be seen how the application of the idea of Western constitutionalism to countries in which Islamic norms and discourse are dominant will turn out in the long run. The introduction of federalism, an overall liberal idea, and the re-establishment of Islam as a state religion in Iraq are very likely to get entangled and affect the federal relationship. Some perceive this constitutional experiment as the most ambitious in modern history; the Afghan constitution and recent constitutional wrangling in Egypt are excellent illustrations of the tumultuous encounter of Islam and liberalism.

As there are no corresponding institutions to watch over and mediate the federal relationship because the territorial/federal chamber of the national parliament intended for this very end has not been established, the only possible umpire of federal relations remains the Federal Supreme Court. It keeps however a rather

low profile and eschews cases associated with the relationship between Kurdistan and the rest of Iraq. One of the reasons why the Supreme Court has adopted this posture is the fact that the constitution explicitly imposes conflicting obligations under Article 2.

The implementation of the concept of constitutionalism and federalism is unthinkable without an active role of the judiciary. Many in Iraqi Kurdistan are suspicious of the federal government, including the Supreme Court as part of it and fear that one day when the central government in Baghdad becomes stronger, the center will stop playing the federal game and curtail the autonomy of Kurdistan. Therefore, relying on political safeguards of Iraqi federalism, as opposed to constitutionalism, does not appeal to the Kurds, as they are a minority in Iraq and will lose any national plebiscite on the issue of federal autonomy.

Obviously, it is incumbent on the Iraqi Supreme Court to give clarifications of the relationship between the law enacted both by the federal and regional legislatures, as well as between the Islamic and democratic principles of the constitution. The extent to which the country adheres to a balanced application of these incongruent sets of principles will depend on the Supreme Court's posture. This constitutional innovation has direct bearings on Iraqi federalism, as any piece of legislation enacted by the Kurdish parliament has to meet both Islamic and liberal principles at a time.

The dismantlement of the established political system in Iraq and the introduction of bewildering changes have been accompanied by an acute struggle for power. The process is on-going and engulfs all political forces; it goes along with tensions and violence, as ethnic and sectarian differences are easily caught in politics. The new Iraq is not an established polity; it is in the process of making, including the federal relationship. Each actor involved attempts to exercise the utmost pressure to carve out the largest possible niche in Iraqi politics that unfolds under a new set of rules. One of the significant variables in sustaining Iraqi federalism is an impressive representation of ethnic Kurds in the key positions of the federal government, from the Iraqi Presidency and the federal Ministry of Foreign Affairs to the chief of staff in the Iraqi Army.

In the new Iraq - where the old political and state system has been dismantled, the Sunni minority at the helm of the state replaced by the Shi'i'a majority, Kurdish nationalism legalized and enhanced by federalism—all political forces are having a hard time to adjust to the new rules, they try to maximize their influence in the process, pushing sometimes their ambitions too far. Iraqi federalism is an ongoing experiment whose overall outcomes are rather positive, but painstaking efforts and a purposeful adjustment of the federal relationship are badly needed. A central theoretical question of the study of federalism whether it is possible to design institutions that are efficient in solving conflicts and stable over time, institutions that would eliminate the paradox of federalism is hard to answer with reference to the Iraqi case.

Writing in 2013, we can say that major disputes between Erbil and Baghdad are being resolved by negotiation rather than by resorting to force, often after

some brinksmanship and sabre rattling. This has never been easy, as in addition to domestic issues, the actors have also to navigate in the rocky environment of regional and international pressure. The federal system remains unstable, but promising. One can conclude that the post-conflict federal experiment in Iraq is bearing its first fruits. It is this sense that is alluded to in the title of this book—that in the context of the violent history of the Iraqi state and the place of the Kurdistan region within it—we can definitely say that the formerly warring parties are now learning to live together.

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